84-875

No. 84-____

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# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

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ARIZONA PUBLIC SERVICE COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, PUBLIC SERVICE COMPANY OF NEW MEXICO, EL PASO ELECTRIC COMPANY, DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES, SOUTHERN CALIFORNIA PUBLIC POWER AUTHORITY,

Petitioners

v.

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,

Respondent

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether the plaintiff Indian Community has the requisite standing to pursue, in conjunction with its claims to participate in and receive water from the Salt River Project, an independent claim for cancellation of a contract, not involving delivery of water from the Salt River Project, but rather the delivery by various municipalities of effluent produced at municipal wastewater treatment plants for use as cooling water at a nearby nuclear power generating facility.

2. Whether Rules 18(b) and 19(a) of the Federal Rules of Civil Procedure operate to eliminate or dilute traditional standing requirements when a plaintiff seeks to assert and pursue, under Rule 18(b), additional claims against indispensable parties joined under Rule 19(a).

## PARTIES INVOLVED IN THE COURT OF APPEALS

The plaintiff-appellant in the court below, respondent herein, is the Salt River Pima-Maricopa Indian Community. The petitioners herein, defendants-appellees below, are Arizona Public Service Company, and Southern California Edison Company, Public Service Company of New Mexico, El Paso Electric Company, the Department of Water and Power of the City of Los Angeles, and Southern California Public Power Authority.[1] Other defendants-appellees, not participating as petitioners herein, are the Salt River Project Agricultural Improvement and Power District, the Salt River Valley Water Users' Association, the Roosevelt Water Conservation District, the Roosevelt Irrigation District, the Town of Youngtown, Arizona and the Cities of Phoenix, Glendale, Scottsdale, Tempe, and Mesa, Arizona. Additional defendants in the trial court, who did not participate in the action on appeal, include the United States of America and James G. Watt, then Secretary of the Interior.

[1] A listing of parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of the Petitioners, required by Rule 28.1 of the Rules of this Court, is included as Appendix D.

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ARIZONA PUBLIC SERVICE COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, PUBLIC SERVICE COMPANY OF NEW MEXICO, EL PASO ELECTRIC COMPANY, DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES, SOUTHERN CALIFORNIA PUBLIC POWER AUTHORITY,

Petitioners

v.

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY

Respondent

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Arizona Public Service Company, Southern California Edison Company, Public Service Company of New Mexico, El Paso Electric Company, Department of Water and Power of the City of Los Angeles, and Southern California Public Power Authority (the "Participant defendants"), hereby petition for the issuance of a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case.

## OPINIONS BELOW

The unreported Memorandum Opinion of the Court of Appeals is annexed as Appendix A. The unreported Memorandum Opinion and Order of the United States District Court for the District of Arizona is included as Appendix B.

## JURISDICTION

The Memorandum Opinion of the Court of Appeals (Appendix A) was issued on September 4, 1984, and this Petition is filed within ninety (90) days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the United States Constitution, U.S. Const. art. III, §2, provides in pertinent part:

> §2 **Jurisdiction**
>
> Section 2. The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; — to all cases affecting ambassadors, other public ministers and counsuls; — to all cases of admiralty and maritime jurisdiction; — to controversies to which the United States shall be a party; — to controversies between two or more states; — between a state and citizens of another state; — between citizens of different states; — between citizens of the same state claiming lands under grants of different states; and between a state, or the citizens thereof, and foreign states, citizens or subjects.

* * *

Rule 18(b) of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 18(b), provides:

> Rule 18. **Joinder of Claims and Remedies**
>
> (b) *Joinder of Remedies; Fraudulent Conveyances.* Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclu-

sion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fradulent as to him, without having first obtained a judgment establishing the claim for money.

* * *

Rule 19(a) of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 19(a), provides:

Rule 19. **Joinder of Persons Needed for Just Adjudication**

(a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

* * *

Rule 82 of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 82, provides:

Rule 82. **Jurisdiction and Venue Unaffected**

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or

the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C. §§ 1391-93.

## STATEMENT OF THE CASE

The litigation in which the present Petition is made concerns, at its core, the grievances of the Salt River Pima-Maricopa Indian Community (hereinafter "the Community") over the exclusion of its lands from the boundaries of the Salt River Project, a Federal reclamation project in Arizona, and the fact that the Secretary of the Interior has allegedly failed to honor certain water rights which the Community claims to have from a variety of legal sources. The more precise and limited question presented for review is whether, in the same litigation and in advance of any determination of its water rights claims, the Community may pursue an independent claim for cancellation of an effluent supply contract between participants in a nuclear power plant under construction in the Phoenix metropolitan area and municipalities operating wastewater treatment plants that produce sewage effluent.

The Community commenced this action in January, 1982, filing its original Complaint in the United States District Court for the District of Columbia, against only the United States and the Secretary of the Interior as defendants. The Complaint sought declaratory and mandamus relief to review actions allegedly taken by the Department of the Interior with regard to the administration of the Salt River Project. The United States and the Secretary of the Interior moved to transfer the cause to the United States District Court for the District of Arizona, and an order to that effect was entered in April, 1982.

Upon transfer of the action, the Community filed a First Amendment Complaint (Appendix C), adding the following entities as additional defendants: the Salt River Project Agricultural Improvement and Power District and the Salt River Valley Water Users' Association (collectively "the Salt River

Project defendants"), the Roosevelt Water Conservation District ("RWCD"), the Roosevelt Irrigation District ("RID"), the Cities of Phoenix, Glendale, Scottsdale, Tempe, Mesa and the Town of Youngtown, Arizona (collectively "the municipal defendants"), and various utilities participating as joint owners in the Palo Verde Nuclear Generating Station ("PVNGS").[2] In addition to claims against the Salt River Project defendants which roughly paralleled those originally asserted against the Secretary of the Interior, the First Amended Complaint (Appendix C) also added Third, Fourth and Fifth Claims for Relief, which sought cancellation of the following contracts:

1. A water delivery contract between the Salt River Project defendants and RWCD pursuant to which RWCD allegedly receives up to 40,000 acre feet of Project water per year. (Appendix C, Third Claim for Relief).

2. A water delivery contract between the Salt River Project defendants and RID pursuant to which RID allegedly receives up to 145,000 acre feet of Project water per year. (Appendix C, Fourth Claim for Relief.)

3. A 1973 contract (the "Effluent Contract") between certain of the Participants in PVNGS and the municipal defendants, pursuant to which effluent produced at sewage treatment facilities operated by the municipal defendants is to be supplied for use as cooling water at PVNGS. (Appendix C, Fifth Claim for Relief.)

As alleged by the Community, the Salt River Project defendants and the Secretary of the Interior are charged with the administration of the Salt River Project and determine to whom water generated by the Project will be delivered. The municipal defendants obtain water from a variety of

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[2] The Salt River Project Agricultural Improvement and Power District is among the participants in PVNGS, but not a petitioner herein due to the fact that the Community asserted in the First Amended Complaint claims against the Salt River Project defendants independent of those concerning PVNGS and the effluent supply contract.

sources, including the Salt River Project, and deliver that water to their municipal water customers. The municipal defendants then collect sewage produced within their respective boundaries and, at great expense, transport it to sewage treatment plants. A portion of the end product of the treatment process — effluent — is then sold to participants in PVNGS pursuant to the Effluent Contract. The effluent secured under the Effluent Contract is transported via pipeline owned by the Participants from the treatment facilities to the PVNGS site. The Community's reservation is located across the Phoenix metropolitan area, some 20 miles east and upstream from the treatment facility from which the effluent is secured.

Conspicuously absent from the First Amended Complaint is any factual allegation or reasonable inference that the Effluent Contract *causes* the injury of which the Community complains — non-delivery of water from the Salt River Project. Nowhere does the Community allege that if the Effluent Contract is invalidated, the Community will somehow receive the additional Project water to which it claims an entitlement. Instead, the Community simply asserts in conclusory terms that the Effluent Contract "lessens the amount of water available for plaintiff's lands within the project and results in direct and material injury to the plaintiff." (Appendix C, Fifth Claim for Relief, para. VI).

The *facts* alleged by the Community, however, do not support such an inference of direct injury. The Participant defendants have no contract with the Salt River Project for water deliveries; the Effluent Contract is with the municipal defendants for effluent produced by them at various sewage treatment facilities. This contract has not directly deprived the Community of the water it seeks. In fact, the First Amended Complaint itself alleges, not that the Community should receive the effluent in question, but merely that "the only lawful and rational use of this return flow is to retain it in Project lands to ease the Project's severe groundwater depletion." (Appendix C, First Claim for Relief, para. 8D).

Upon service of the First Amended Complaint, the Salt River Project defendants filed an extensive Motion to Dismiss in which the Participant defendants joined, arguing, *inter alia*, that the effluent secured pursuant to the Effluent Contract was not Project water subject to their control. Ruling upon this and other Motions submitted, the district court issued its Memorandum Opinion and Order dated March 18, 1983 (Appendix B). After addressing and resolving various issues raised by the Motion to Dismiss filed by the Salt River Project defendants, the district court concluded that the Community lacked the requisite standing to seek cancellation of the contracts involved in its Third, Fourth and Fifth Claims for Relief, because:

> . . . Other statements within the amended complaint confirm, however, that the contracts do not cause the Community's injury. . .
>
> Because the contracts do not cause the Community's injury, a declaration that the contracts are illegal would not redress the injury suffered by the Community. The Association's decision not to deliver water to the Community causes the Community's injury.

Appendix B, p. B-7.

RID thereafter moved for judgment on the pleadings, joined by the Participant defendants, on the basis that the Community lacked standing to challenge the contracts in question. The district court entered an order granting the motion for judgment on the pleadings and directing entry of judgment in accordance with Rule 54(b), Federal Rules of Civil Procedure, dismissing the Third, Fourth and Fifth Claims for Relief of the First Amended Complaint for lack of standing and dismissing the entire action as to all parties other than the United States, the Secretary of the Interior, and the Salt River Project defendants.

The Community took a timely appeal to the United States Court of Appeals for the Ninth Circuit, which exercised jurisdiction pursuant to 28 U.S.C. § 1291. In a split decision embodied in its Memorandum Opinion of Septem-

ber 4, 1984 (Appendix A), the Court of Appeals reversed the district court and remanded the action for further proceedings. Relying extensively on the provisions of Rules 18 and 19, Federal Rules of Civil Procedure, the majority erroneously concluded that "[T]he nature of the Community's water rights claims shows that the contracts of the joined defendants are sufficiently related to the underlying dispute with the United States to provide the requisite standing." (Appendix A, p. A-4), and wholly disregarded the fact that the Community's First Amended Complaint is devoid of any allegation that the Effluent Contract must be invalidated in order to provide water to satisfy the Community's asserted entitlements.

Judge Wallace's dissenting opinion accurately recognized that: "[T]he Community's real concern is with the administration of the project and the alleged wrongful denial of project water to members of the community. *** There is nothing before us, however, that indicates how the judicial invalidation of the challenged contracts between the project and various third parties would result in a change of the Secretary's alleged policy of denying project water to the Community." Judge Wallace also correctly identified the important distinction between the Effluent Contract which was the subject of the Community's Fifth Claim for Relief, and the agreements challenged under the Community's Third and Fourth Claims for Relief:

> Indeed, the contract challenged in the Community's fifth claim involves the delivery of waste water from several municipalities to a nuclear power plant for cooling purposes. I can find no basis for the Community to challenge this sale of waste water that has nothing to do with the purported denial of project water to the Community. Although the other contracts challenged by the Community do, at least, involve water from the project, the connection between those contracts and the alleged denial of project water to the

> Community is simply too attenuated to support the Community's claims for relief.

Appendix A, p. A-6.

## REASONS FOR GRANTING THE WRIT

This Court has held and consistently reaffirmed that Article III of the United States Constitution prescribes basic "case and controversy" limitations on the federal courts' judicial authority. The rules of standing are threshold determinants of that limitation, *Warth v. Seldin*, 422 U.S. 490 (1975), and require, before a federal tribunal can proceed, affirmative resolution of the inquiry "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Id.* at 498-99 (emphasis in original). More recently, this Court has declared that, as an *irreducible minimum*, a litigant seeking to invoke the authority of a federal court must show that (1) "he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," (2) the injury "fairly can be traced to the challenged action," and (3) the injury "is likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

By extracting from the perceived interplay of Rules 18(b) and 19(a), Federal Rules of Civil Procedure, an unarticulated doctrine of "anticipatory standing," the court of appeals has at once reduced the "irreducible minimum" standing requirements enunciated by this Court, and permitted those Rules to expand the district court's jurisdiction, in contravention of Rule 82, to permit prosecution of a separate claim which the Community manifestly lacks standing to pursue independently. The opinion of the court of appeals not only defies its own prior decisions and those of this Court, but also opens the door to the joinder, in litigation properly brought in federal court, of a mass of unrelated present or future perceived claims, limited only by

the imagination of counsel uninhibited by traditional standing requirements.

## I.

## UNDER PRINCIPLES ESTABLISHED BY PRECEDENTS OF THIS COURT, THE COMMUNITY LACKED STANDING TO CHALLENGE THE EFFLUENT CONTRACT

From its inception, the principal thrust of this litigation has been provided by the Community's claims (as set forth in the First and Second Claims for Relief in the First Amended Complaint) that it has been improperly denied the right to participate in, and have certain alleged water rights satisfied from water generated by, the Salt River Project. As of the present, this asserted right of the Community to participate in, and receive water from, the Salt River Project remains unadjudicated.

The present Petition concerns the entirely distinct purported "case or controversy" which the Community presented in its Fifth Claim for Relief, in which it sought invalidation of the Effluent Contract between the Participant defendants and the municipal defendants. That particular contract did not involve the delivery of water from the Salt River Project for use outside Project boundaries, as was alleged to be the case with respect to the water service contracts involved in the Third and Fourth Claims for Relief. To the contrary, the Effluent Contract involves the sale and delivery to the Participant defendants of effluent produced at sewage treatment facilities operated by the municipal defendants. In dissent, Judge Wallace correctly perceived this critical distinction between the Effluent Contract and the other water service contracts involved:

> Indeed, the contract challenged in the Community's fifth claim involves the delivery of waste water from several municipalities to a nuclear power plant for cooling purposes. I can find no basis for the Community to challenge this sale of waste water that has nothing to do with the purported denial of project

> water to the Community. Although the other contracts challenged by the Community do, at least, involve water from the project, the connection between those contracts and the alleged denial of project water to the Community is simply too attenuated to support the Community's claims for relief.

Appendix A, p. A-6. The only possible connection between the Community's Fifth Claim for Relief and the balance of the litigation was the Community's conclusory allegation that the Effluent Contract "lessens the amount of water available for plaintiff's lands within the project. . ." (Appendix C, Fifth Claim for Relief, para. VI).

This Court has previously declared that, *at an absolute minimum*, a litigant seeking to invoke the authority of the federal courts must show that (1) he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," (2) the injury "fairly can be traced to the challenged action" and (3) the injury "is likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1972). The Ninth Circuit itself, in *Bowker v. Morton*, 541 F.2d 1347 (9th Cir. 1976), restated these bedrock prerequisites in the following fashion:

> Compactly put, the test for standing applicable to this case is that the plaintiffs must have alleged (a) a particularized injury (b) concretely and demonstrably resulting from defendants' action (c) which injury will be redressed by the remedy sought.

*Id.*, 541 F.2d at 1349 [relying on *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976) and *Warth v. Seldin*, 422 U.S. 490 (1975)].

The only particularized injury alleged by the Community in the First Amended Complaint is the denial of the right to participate in and receive water from the Salt River Project. There is, and can be, no allegation that this alleged depriva-

tion of rights to Salt River Project water results in any fashion from the fact that the Participant defendants entered into the Effluent Contract with the municipal defendants or that the Community's perceived grievances would be cured, and its water rights honored, by the Effluent Contract's cancellation.

The court of appeals glossed over the standing inquiry, at least with respect to the Fifth Claim for Relief, by concluding that the Community had alleged that its water rights were not being honored: "because the federal government is entering into contracts with Arizona entities which deplete the amount of water available to the Community." (Appendix A, p. A-3.) That statement is patently inaccurate insofar as the Effluent Contract is concerned. That Contract clearly does not, and was not even alleged to, involve the sale of Salt River Project water by the "federal government" or the Salt River Project defendants. Such a strained and inaccurate reading of the Community's First Amended Complaint cannot supply standing to pursue the Fifth Claim for Relief.

The only allegation in fact made by the Community was that the Effluent Contract "lessens the amount of water available for plaintiff's lands". That is patently insufficient to satisfy the elements of this Court's established standing requirements. The implicit premise of the Community's position is that, upon cancellation of the Effluent Contract, the treated wastewater would become subject to the dominion and control of the Salt River Project, and the Salt River Project defendants and the Secretary of the Interior would thereupon devote the effluent to satisfaction of the Community's heretofore rejected water rights claims. The premise is logically absurd, unsupported by any allegation in the First Amended Complaint, and the very type of "unadorned speculation" that this Court has previously held "will not suffice to invoke the federal judicial power." *Simon v. Eastern Kentucky Welfare Rights Organization,* supra, 426 U.S. at 44.

## II.

## THE FEDERAL RULES OF CIVIL PROCEDURE CANNOT OPERATE TO REDUCE STANDING REQUIREMENTS ENUNCIATED BY THIS COURT

Given the patent deficiencies in the Community's standing to independently pursue its Fifth Claim for Relief, and its cavalierly erroneous analysis of that issue, it is apparent that the court of appeals was of the view that the standing tests enunciated by this Court were in some fashion satisfied by the interplay of Rules 18 and 19 of the Federal Rules of Civil Procedure.

Initially, the court of appeals erroneously characterized the parties to the Effluent Contract as indispensable parties to the Community's claims against the Salt River Project defendants and the Secretary of the Interior:

> A ruling on Counts I and II, that the Secretary is violating the Community's rights by its administration of the project and that the Community is entitled to more water than it is presently receiving cannot afford full relief unless the contracts under which the water is being delivered outside the project are either invalidated or reformed.

(Appendix A, p. A-3.) The court then apparently reasoned that, the Participant defendants having properly been joined as indispensable parties to the First and Second Claims for Relief, the Community was entitled to assert against them any additional claims it might have, by reason of Rule 18(b), Fed.R.Civ.P. This then led to the court's ultimate conclusion that: "The nature of the Community's water rights claim shows that the contracts of the joined defendants are sufficiently related to the underlying dispute with the United States to provide the requisite standing." (Appendix A, p. A-4.)

Initially, the court's construction and application of Rules 18 and 19 are considerably free from doubt. It is not at all clear that the presence of the Participant defendants before the court will be either necessary or efficacious to provide

the Community with complete relief in the event it prevails on its claims to Salt River Project water. The municipal defendants supply customers within their boundaries with water secured from the Salt River Project and a variety of other sources. The municipal defendants also gather sewage generated by these water customers and others and transport it to treatment facilities at which effluent is produced. It is this product of the treatment process that is sold to the Participant defendants for use at PVNGS. There has been no allegation or showing that, even if the Effluent Contract were to be invalidated, any of the effluent would be either available or necessary to satisfy the Community's claims to Salt River Project water.

Nor is it clear that Rule 18 is properly employed as a vehicle, or as justification, for asserting against parties, joined in an action under Rule 19, additional and unrelated claims which the plaintiff anticipates it might have. The Advisory Committee Note to Rule 18 makes clear that Subsection (b) was "inserted to make it clear that in a single action a party should be accorded all the relief to which he is entitled regardless of whether it is legal or equitable or both." It was not designed to provide a plaintiff with an independent means for pursuing separate claims against parties whose presence is indispensable to adjudication of the plaintiff's underlying claims against the defendant.

Regardless of whether the lower court's novel interpretation of Rules 18 and 19 is appropriate, the important consideration is that these Rules, either alone or in conjunction with each other, cannot supply a plaintiff with standing to pursue a claim, and that is precisely what the court of appeals has allowed them to do. The Community was found to have standing to pursue the Fifth Claim for Relief because, in the view of the court of appeals, it was *"sufficiently related to* the underlying dispute with the United States. . ." (Appendix A, p. A-4; emphasis added)

No such alternative "sufficiently related to" test for standing is sanctioned by prior decisions of this Court.

Under the rationale of the court of appeals, standing to pursue any single claim in a federal court against one or several defendants automatically confers upon the plaintiff standing, without further inquiry, to pursue any and all claims which that plaintiff desires to assert, not against the original defendants, but against third parties whose presence is deemed indispensable to resolution of the original claim. The only apparent limitation is the ingenuity of counsel to conjure up arguments that Rules 18(b) and 19(a) are satisfied.

This construction of Rules 18 and 19 renders them invalid and unconstitutional. The requirement that a plaintiff have standing to pursue a claim is neither discretionary nor prudential — it is a fundamental jurisdictional requirement arising out of Article III of the Constitution. To hold that the joinder of the Participant defendants as indispensable parties to the Community's claims against the Secretary of the Interior and the Salt River Project defendants automatically confers upon the Community, without further inquiry, standing to assert separate claims against the parties thus joined permits Rules 18 and 19 "to extend . . . the jurisdiction of the United States district courts," in contravention of the explicit terms of Rule 82. The practical consequences will be to require the federal courts to adjudicate a host of claims brought against assertedly "indispensable parties" to complex litigation, regardless of whether a true "case or controversy" is presented, notwithstanding the restrictions imposed by Article III.

## CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted this 3rd day of December, 1984.

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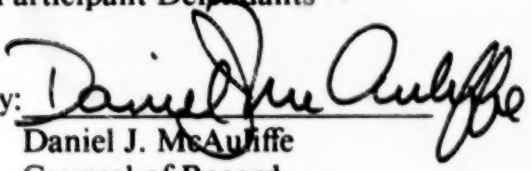
By: 
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Counsel of Record

No. 84-___

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October Term, 1984

ARIZONA PUBLIC SERVICE COMPANY, *et. at.*,
Petitioners

v.

SALT RIVER PIMA-MARICOPA
INDIAN COMMUNITY,
Respondent

## CERTIFICATE OF SERVICE BY MAIL

Daniel J. McAuliffe, being a member of the bar of this Court, hereby certifies:

1. That he is an active member of the bar of this Court and that he is counsel of record for the petitioners herein.

2. That the Petition For A Writ of Certiorari To The United States Court of Appeals for the Ninth Circuit submitted herewith, and the Appendices thereto, have been served upon counsel for all the parties, in accordance with the provisions of Rule 28 of the Rules of this Court, by placing three copies of the same in the United States mail, first class postage prepaid, properly addressed, to:

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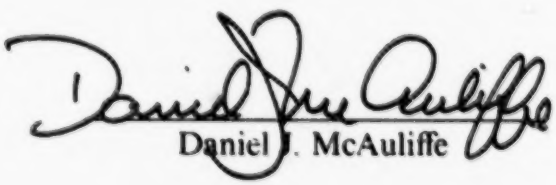
3. That the foregoing represents service on all parties required to be served under the provisions of Rule 28 of this Court.



Daniel J. McAuliffe

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

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| SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,<br>Plaintiff-Appellant,<br>v.<br>UNITED STATES OF AMERICA, JAMES G. WATT, Secretary of the Interior, SRP AGRICULTURAL IMPROVEMENT/POWER DISTRICT, an Arizona municipal corporation, SALT RIVER VALLEY WATER USERS' ASSOCIATION, an Arizona corporation, ROOSEVELT WATER CONSERVATION DISTRICT, an Arizona municipal corporation, ROOSEVELT IRRIGATION DISTRICT, an Arizona municipal corporation, and CITY OF PHOENIX, an Arizona municipal corporation, et al., etc.,<br>Defendants-Appellees. | No. 83-2095<br><br>DC No.<br>CIV 82-745<br>PHX CLH<br><br>MEMORANDUM* |

**Appeal from the United States District Court**
**for the District of Arizona**
**Charles L. Hardy, District Judge, Presiding**

**Argued and Submitted February 16, 1984**

Before: WALLACE, FLETCHER and FERGUSON, Circuit Judges

*This panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

The Salt River Pima-Maricopa Indian Community (the Community) appeals the district court's entry of an adverse judgment on the pleadings on three of the five claims for relief contained in the Community's first amended complaint. Although the district court's judgment concluded fewer than all of the Community's claims, it was entered pursuant to a rule 54(b) determination that there was no reason for delay. Accordingly, we have jurisdiction to hear this appeal under 28 U.S.C. § 1291. We reverse.

The Community originally filed a two-count action in Washington, D.C. against the Secretary of the Interior (the Secretary). It sought declaratory and injunctive relief from the Secretary's administration of the Salt River Project (the project), a federal water reclamation project, on the grounds that the Secretary had violated the Warren Reclamation Act (the Warren Act), 43 U.S.C. §§ 523-525, and had discriminated against the Community by diverting water from the project to other uses before meeting the needs of the Community. The Secretary moved to transfer the case to Arizona so that Arizona parties interested in the allocation of project water could protect their interests before the trial court. The motion was granted and the case was transferred to the Arizona District Court.

Following the transfer of the action from Washington, D.C. to Arizona, the Community filed an amended complaint that added a water conservation district, an irrigation district, several municipalities, and the owners of a nuclear power plant as defendants. In its amended complaint, the Community added three counts seeking declaratory judgments invalidating contracts for the delivery of project water to these added defendants, who were located outside the project's boundaries. The Community asserted that these contracts violated the Warren Act, which prohibits the export of reclamation project water unless the water needs of all lands within the project are first met.

The district judge ruled that the challenged contracts were not the cause of the injury allegedly suffered by the Commu-

nity. He therefore held that the Community lacked standing to assert its third, fourth, and fifth claims for relief and entered judgment against the Community on those claims.

The district court erred in concluding that there is an insufficient causal link between the challenged contracts and the injury the Community sought to redress by filing this action. The Community argued that under the Warren Act it is illegal for the project to transfer water to the joined defendants unless the Community receives enough water from the project to satisfy its needs. The Community alleged that it is not receiving that water because the federal government is entering into contracts with Arizona entities which deplete the amount of water available to the Community. A ruling on Counts I and II, that the Secretary is violating the Community's rights by its administration of the project and that the Community is entitled to more water than it is presently receiving, cannot afford full relief unless the contracts under which the water is being delivered outside the project are either invalidated or reformed.

Rule 19 of the Federal Rules of Civil Procedure provides for a joinder of parties when necessary to accord complete relief, and Rule 18(b) provides for the addition of claims and remedies. The Community's first amended complaint falls within Rule 18(b), which provides:

> Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties.

*Id.*

If the district court had doubts whether the relief requested by the Community required adjustment of the contract users' rights, the proper course would have been "to defer decision until the action was further advanced." Fed. R. Civ. P. 19 advisory committee note. The possibility of an

adverse decision on the merits does not destroy standing to seek a complete remedy.

Under Rules 18 and 19, jurisdiction over added parties and claims must be independently established. *See* Fed. R. Civ. P. 82. The nature of the Community's water rights claim shows that the contracts of the joined defendants are sufficiently related to the underlying dispute with the United States to provide the requisite standing. The Community alleged that the contracts are illegal under the Warren Act, and that because of the illegal contracts, less water is available in the project to meet its needs. The grounds upon which the contracts are allegedly illegal are intimately linked to the plaintiff's injury. If the Community is not entitled to the water, the contracts are legal; if it is entitled to the water, under the Warren Act the contracts are unauthorized. The question of the contracts' validity cannot be separated from the plaintiff's right to the water, for the latter determines the former.

The relationship between the plaintiff's injury and the water rights contracts at issue is well illustrated by *Commonwealth Trust Co. v. Smith*, 266 U.S. 152 (1924). In that case the Supreme Court held that all parties holding contract rights to water in a water reclamation project were indispensable parties to a lawsuit which sought to foreclose a lien on the water rights of certain individual holders. The Court said:

> If . . . the supply of water is not adequate for the reclamation of the acreage for which water-right contracts are outstanding, and yet is adequate for the reclamation of a smaller acreage, as is asserted on one side, it is evident that some of the contracts must be eliminated before any of the lands can be said to be reclaimed, or be adjudged subject to such a lien. Of course, an ascertainment or designation of the contracts which must fall and those which are to stand cannot be had in a suit to which their holders are not parties.
>
> The same thing is true as respects the elimination of contracts made in contravention of the provision in the

> contract between the state and the company that water rights should not be sold in excess of the available water supply.

*Id.* at 160.

Given a scarce water supply, the connection between the Community's claim to the water, its claim against the Salt River Project, and the claim against the private or state users is not attenuated. The Community claims a statutory right to water now going to other users. As in *Smith,* the plaintiff's claim "involves a determination of the total outlay and of the total area reclaimed. ... Every contract holder has an interest in them and will be affected by their determination, however made." 266 U.S. at 161. If the Community's claim is rejected, the users will have safeguarded their right to the water — but if the community is correct, the other users must be party to the suit for their rights to the water will necessarily be affected if the Community is to be afforded effective relief. *See* Fed. R. Civ. P. 19. On remand, the district court should determine whether other parties with rights to the water which may be affected by this case need to be joined under Rule 19.

On remand, the district court will undoubtedly consider the effect of *Arizona v. San Carlos Apache Tribe,* 103 S.Ct. 3201 (1983). We express no opinion on that question. Now we are only concerned with whether it was correct to dismiss the three counts on the issue of standing. We conclude that it was not.

REVERSED AND REMANDED.

RE: **Salt River Pima-Maricopa Indian Community v. United States — No. 83-2095**

WALLACE, Circuit Judge, dissenting:

I conclude that the district judge was correct in his determination that there is an insufficient causal link between the challenged contracts and the injury the Community sought to redress by filing this action. The Community's real concern is with the administration of the project and the alleged wrongful denial of project water to members of the Community. The Community's challenge to this alleged policy is the subject of the Community's first two claims for relief. There is nothing before us, however, that indicates how the judicial invalidation of the challenged contracts between the project and various third parties would result in a change of the Secretary's alleged policy of denying project water to the Community. Indeed, the contract challenged in the Community's fifth claim involves the delivery of waste water from several municipalities to a nuclear power plant for cooling purposes. I can find no basis for the Community to challenge this sale of waste water that has nothing to do with the purported denial of project water to the Community. Although the other contracts challenged by the Community do, at least, involve water from the project, the connection between those contracts and the alleged denial of project water to the Community is simply too attenuated to support the Community's claims for relief.

The concept of standing "involves both constitutional limitations on federal court jurisdiction and prudential limits on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The Supreme Court delineated the constitutional requirements for standing as follows:

> [A]t an irreducible minimum, Art. III requires the party who invokes the Court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," ... and that the injury "fairly can be traced to

> the challenged action" and "is likely to be redressed by a favorable decision,". . . .

*Valley Forge College v. Americans United for Separation of Church and State,* 454 U.S. 464, 472 (1982), *quoting Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 99 (1979); *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 38, 41 (1976). The Community has failed to make this necessary showing. It is speculative whether the invalidation of the contracts for delivery of project water and effluent would result in the Community obtaining the water to which it claims a right.

Even if the Community had standing, I would affirm the district court. This may be done on any ground finding support in the record. *Salmeron v. United States,* 724 F.2d 1357, 1364 (9th Cir. 1983); *United States v. Aranson,* 696 F.2d 654, 658 (9th Cir. 1983).

A judgment on the pleadings is appropriate where the moving party is entitled to judgment as a matter of law after accepting as true all the allegations of the nonmoving party. *Austad v. United States,* 386 F.2d 147, 149 (9th Cir. 1969); 5 Wright & Miller, *Federal Practice and Procedure* § 1368 (1969). Because the challenged contracts are not the cause of the Community's alleged injury, it is clear that the Community can prove no set of facts in support of its third, fourth, and fifth claims that would entitle it to relief. I thus conclude, as a matter of law, that these claims fail to state a claim upon which relief can be granted. *See Keniston v. Roberts,* 717 F.2d 1295, 1300 (9th Cir. 1983).

Deciding the case as I suggest would not prevent a motion by the Community under rule 19 to join in claims one and two any or all of the defendants who were named in the Community's third, fourth, and fifth claims, if complete relief cannot be accorded without them or if their absence would create a substantial risk of imposing double or inconsistent obligations on the remaining parties. *See* Fed. R. Civ. P. 19(a). That is different from what the majority allows in this case.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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| SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,<br>Plaintiff,<br>vs.<br>UNITED STATES OF AMERICA, et al.,<br>Defendants. | No. CIV 82-745 PHX CLH<br>MEMORANDUM OPINION AND ORDER |

This is an action brought by the Salt River Pima-Maricopa Indian Community (Community) against the United States, the Secretary of the Department of the Interior, the Salt River Project Agricultural Improvement and Power District (District), and the Salt River Water Users Association (Association) seeking declaratory and injunctive relief from the defendants' management of the Salt River Project. As well, numerous other municipal corporations are joined as defendants for their participation in contracts for the export of Salt River water from the area governed by the Salt River Project.

**The Complaint**

The plaintiff by its first amended complaint states five claims for relief:

1. The first claim seeks a declaratory judgment against the United States and the Secretary of the Interior that the Community is entitled to additional quantities of water based on water rights derived from four sources:

A. Reserved water rights derived from the creation of the Salt River Indian Reservation by the Executive Order of June 14, 1879.

B. The Kent Decree of *Hurley v. Abbott*, No. 4564 Decree, Dist. Ct. 3rd Judicial Dist., Maricopa Co. (1910) which ordered that specific allotment lands on

the Salt River Reservation had water rights under the common law of prior appropriation.

C. The Act of May 18, 1916, 39 Stat. 123-30, directing the Secretary of the Interior to provide perpetual water rights for 631 ten acre allotments to the Salt River Indians from water developed from the Salt River Project.

D. A fair share of the surplus water created by the Salt River Project because the Community is a land member of the Salt River Project.

2. The second claim seeks a declaratory judgment against the District and the Association that the Community is entitled to additional quantities of water based on the above four sources of water rights.

3. The third and fourth claims are brought against the Roosevelt Water Conservation District and the Roosevelt Irrigation District, respectively, as well as against the District and Association. These claims seek a declaratory judgment that contracts between the District and the Association and the Roosevelt Water Conservation District and the Roosevelt Irrigation District violate the Warren Act, 43 U.S.C. § 523-24, because each contract permits the export of Salt River Project water before the needs of land members of the Project are first met.

4. The fifth claim is against the joint owners of the 91st Avenue Filtration Plant and the joint owners of the Palo Verde Nuclear Power Plant and seeks a declaratory judgment that the contract between these joint owners to deliver waste water from the Filtration Plant to the Nuclear Power Plant violates the Reclamation Act, 43 U.S.C. § 391 et seq. & § 485 et seq., and the Colorado River Basin Project Act, 43 U.S.C. § 1501 et seq.

**Defendants' Bases for Dismissal**

The defendants Association and District give five bases for dismissal:

1. Under the principles of res judicata, the plaintiff's claims to water rights under federal law have merged into

the judgment known as the Kent Decree of *Hurley v. Abbott, supra.*

2. The Court should abstain in favor of the continuing jurisdiction of the state courts under the *Hurley v. Abbott* decision or in favor of the general adjudication of water rights to the Salt River in the state courts.

3. The plaintiff has failed to join indispensible parties, requiring dismissal under Rule 19, Federal Rules of Civil Procedure.

4. The Court does not have jurisdiction to review the actions of the Secretary of the Interior because these actions are "committed to discretion" and, thus, removed from federal court jurisdiction under Administrative Procedure Act, 5 U.S.C. § 702.

5. The United States Court of Claims has exclusive jurisdiction over the claims of the plaintiffs against the United States, and because the United States is an indispensible party, the action must be dismissed.

The other defendants whose contracts are challenged by this action join in the motion to dismiss of the District and the Association. The Roosevelt Water Conservation District also adds as an additional basis for dismissal the lack of standing by the Community to challenge the legality of the contracts in question.

1. **Jurisdiction**

The defendants allege that the Court does not have subject-matter jurisdiction over the Community's claim against the United States and the Secretary of the Interior. Although this contention may be correct, it is not relevant to this motion to dismiss. The United States is a defendant only in the first claim of the first amended complaint. Subject-matter jurisdiction over the first claim is predicated on 28 U.S.C. § 1331 and 5 U.S.C. § 702; jurisdiction to hear the remaining four claims against the defendants bringing this motion to dismiss is predicated on 28 U.S.C. § 1362. Thus, even if this issue of subject-matter jurisdiction were

decided in favor of the United States, it would not serve as a basis for dismissal of the claims against the defendants bringing this motion to dismiss. Accordingly, the defendants' arguments concerning subject-matter jurisdiction over the claims against the United States need not be resolved.

2. **Abstention**

The defendants contend that this Court should abstain from hearing the Community's claims in deference to the continuing jurisdiction ordered by the Superior Court of Arizona in *Hurley v. Abbott, supra,* or the general adjudication of water rights to the Salt River now pending in the Superior Court of Arizona. The first and second claims of the complaint seek a quantity of water based on water rights that have not yet been adjudicated. Under the common law of prior appropriation water rights are established on the date of appropriation and limited by quantity to the amount claimed and put to beneficial use. *See Colorado River Water Conservation District v. United States,* 424 U.S. 800, 805 (1976). Reserved water rights are consistent with the law of prior appropriation insofar as the tribe's water right is reserved on the date the Indian land reservation is created and is superior only to later appropriators *Id.* Reserved water rights, thus, interlock with water rights by prior appropriation. Accordingly, a general adjudication fixing water rights *inter sese* is preferred to an action such as this which would only quiet title to the Community's water rights. *See State of California v. United States,* 235 F.2d 647, 663 (9th Cir. 1956); *In Re General Adjudication of All Rights to Use Water,* 531 F. Supp. 449, 457-58 (D.S.D. 1982).

Consequently, abstention in favor of the general adjudication now pending in state court has much merit. *See Matter of Determination of Conflicting Interests,* 484 F. Supp. 778 (D. Ariz. 1980), *rev'd sub. nom., San Carlos Apache Tribe v. State of Arizona,* 668 F.2d 1093 (9th Cir. 1982), *cert. granted,* 51 U.S.L.W. 3253 (U.S. March 4, 1982) (81-2147). But dismissal would clearly be improper if the state courts

are without jurisdiction to determine Indian water rights. *Colorado River Water Conservation District v. United States, supra* at 808. In *San Carlos Apache Tribe v. United States, supra,* the Ninth Circuit ruled that the State of Arizona did not have jurisdiction to adjudicate Indian water rights unless the state legislature had expressly assumed concurrent jurisdiction by repealing conflicting provisions of the Arizona State Constitution. In light of this ruling, the State of Arizona does not appear to have jurisdiction to hear the claims of this cause of action. Therefore, dismissal under the doctrine of abstention would be improper.

3. **Indispensable Parties**

The defendants argue that, because the first and second claims require adjudication of the Community's water rights, all parties whose water rights might be affected by such an adjudication must be joined as indispensable parties under Rule 19, Federal Rules of Civil Procedure.

Because water rights interlock, the determination of the Community's water rights in this cause of action would have repercussions well beyond the plaintiff and defendants of this case. Indeed, this action would alter the water rights of parties without any opportunity for those parties to be heard. *See State of California v. United States, supra* at 663.

Therefore, if the Community wishes to have its water rights adjudicated, it must join all water rights owners that would be affected by this determination. *See Hurley v. Abbott,* 259 F.Supp. 669 (D. Ariz. 1966). However, the second claim of the complaint also seeks delivery of water in accordance with water rights already established by the Kent Decree of *Hurley v. Abbott, supra,* and the Act of May 18, 1916, *supra.* If the Community seeks delivery only under these established water rights, the claim may proceed without further joinder of parties.

4. **Standing**

The Roosevelt Water Conservation District alleges that the Community lacks standing to challenge the validity of the contract between the Association and itself because the

Community is not a party to the contract. Although Roosevelt Water Conservation District correctly asserts the principle that one cannot sue on a contract unless one is a party to the contract, this principle is not applicable to this case. The Community is not asserting derivative rights under the contract; rather, it is alleging that it is injured by the contract and the contract violates federal law. Because the Community is not suing on the contract, the argument of the Roosevelt Water Conservation District must fail.

For reasons independent of the argument of Roosevelt Water Conservation District, however, the Court concludes that the Community lacks standing to challenge the contracts of the third, fourth, and fifth claims of its first amended complaint.

The Supreme Court has articulated four requirements for standing. The first two are requirements imposed by Article III of the United States Constitution; the second two are merely "prudential considerations": The complaint must show

> (1) actual or threatened injury as a result of the illegal conduct of the defendant;
>
> (2) a causal connection between the injury and the challenged action such that the injury is "likely to be redressed by a favorable decision";
>
> (3) an injury not of such a wide public significance as to amount to a "generalized grievance"; and
>
> (4) interest of plaintiff that fall within the "zone of interests to be protected or regulated by the statute or constitutional guarantee".

*Valley Forge Christian College v. Americans United for Separation of Church and State*, _____ U.S. _____, 102 S. Ct. 752, 758, 760 (1982).

The third, fourth, and fifth claims of the amended complaint state allegations that satisfy the first, third and fourth requirements of standing: The Community, alleging a deprivation of water rights, presents an actual injury and an

individual grievance, and the statutes cited as the basis for the contracts' illegality appear to place the Community, a land member of the Project area, within the zone of interests protected by the statutes.

However, the second requirement that the challenged action cause the injury such that the remedy sought will likely redress the injury is not presented in the first amended complaint.

The causal connection between the contracts and the deprivation of water to the Community is stated in the following manner:

> The illegal deliveries of project water [to Roosevelt Water Conservation District, Roosevelt Irrigation District, and the Palo Verde Nuclear Power Plant] lessen the amount of water available to plaintiff's lands within the project and result in direct and material injury to the plaintiff for which there is not adequate remedy at law.

First Amended Complaint, p.7, 10, 13. Other statements within the amended complaint confirm, however, that the contracts do not cause the Community's injury. The plaintiff alleges that the contracts are illegal because the Association does not deliver to the Community all the water it is entitled to. First Amended Complaint, p.7, 9, 13. Thus, the complaint reverses the causal connection between the injury and the contracts.

Because the contracts do not cause the Community's injury, a declaration that the contracts are illegal would not redress the injury suffered by the Community. The Association's decision to not deliver water to the Community causes the Community's injury. Thus, only the first and second claims seek relief that will remedy the Community's injury and, accordingly, the third, fourth and fifth claims for relief must be dismissed for lack of standing.

IT IS ORDERED as follows:

1. Denying the motions to dismiss for lack of subject-matter jurisdiction.

2. Denying the motions to dismiss on the basis of the doctrine of abstention.

3. Denying the motion to dismiss for failure to join indispensible parties insofar as plaintiff seeks to compel enforcement of existing judicially or legislatively decreed water rights, but granting the motion insofar as plaintiff seeks an adjudication of water rights.

4. Granting the motion of Roosevelt Water Conservation District to dismiss Counts three, four and five of the First Amended Complaint for lack of standing.

DATED this 18 day of March, 1983.

CHARLES L. HARDY
Judge of the United States
District Court

cc: all counsel of record

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,

Plaintiff

vs.

UNITED STATES OF AMERICA and JAMES G. WATT, SECRETARY OF THE INTERIOR; SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, an Arizona municipal corporation; SALT RIVER VALLEY WATER USERS' ASSOCIATION, an Arizona corporation; ROOSEVELT WATER CONSERVATION DISTRICT, an Arizona municipal corporation; ROOSEVELT IRRIGATION DISTRICT, an Arizona municipal corporation; CITY OF PHOENIX, an Arizona municipal corporation; CITY OF GLENDALE, an Arizona municipal corporation; CITY OF SCOTTSDALE, an Arizona municipal corporation; CITY OF TEMPE, an Arizona municipal corporation; CITY OF MESA, an Arizona municipal corporation; TOWN OF YOUNGTOWN, an Arizona municipal corporation; ARIZONA PUBLIC SERVICE COMPANY, an Arizona corporation; SOUTHERN CALIFORNIA EDISON COMPANY, a California corporation; PUBLIC SERVICE COMPANY OF NEW MEXICO, a New Mexico corporation; EL PASO ELECTRIC COMPANY, a Texas corporation; DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES, a California municipal corporation, SOUTHERN CALIFORNIA PUBLIC POWER AUTHORITY, a California joint powers agency; M-S-R PUBLIC POWER AGENCY, a California joint powers agency,

Defendants.

NO. CIV.
82-745
PHX CLH

FIRST
AMENDED
COMPLAINT

## FIRST CLAIM FOR RELIEF

(For Declaratory Judgment and Mandamus)

1. **JURISDICTION.** The plaintiff is a community of American Indians organized under Section 16 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 987, 25 U.S.C. §476. The defendant James G. Watt is Secretary of the Interior and this action is brought against him in his official capacity. This Court's jurisdiction is conferred by 28 U.S.C. §§1331(a), 1361 and 1362. The United States of America is joined as a defendant pursuant to the consent conferred by 28 U.S.C. §702.

2. **NATURE OF THE ACTION.** This is a claim for review of Interior Department actions undertaken in the administration of the Salt River Project, a federal reclamation project, which violate acts of Congress and the United States Constitution, and for specific relief against the Secretary of the Interior with respect to such actions. The Acts of Congress which are being violated are: the Reclamation Act of June 17, 1902, 32 Stat. 388, 43 U.S.C. §§391 et seq.; the Warren Act of February 21, 1911, 36 Stat. 925, 43 U.S.C. §§523-525; the Act of May 18, 1916, 39 Stat. 130; and the Reclamation Project Act of August 4, 1939, 53 Stat. 1187, 43 U.S.C. §§485 et seq. The Constitutional provision which is being violated is the due process clause of the Fifth Amendment.

3. **THE PLAINTIFF'S STANDING.** The plaintiff's reservation is located along the Salt River in Maricopa County, Arizona, east of the City of Scottsdale and north of the City of Tempe. It was reserved from the public lands of the United States by the Executive Order of President Rutherford B. Hayes, dated June 14, 1879. With the reservation of lands there was also reserved water from the adjoining Salt River sufficient to cultivate the practicably irrigable acreage. The Plaintiff's lands enjoy other specific water rights under federal law. The Secretary of the Interior has since 1910 asserted total dominion and control over the distribution of the water of the Salt River through the administration of the

Salt River Project. In administering the Project the Secretary of the Interior causes direct and substantial injury to the plaintiff by refusing to recognize its federal water rights and by making deliveries of water to others in violation of federal law.

4. **DESCRIPTION OF THE SALT RIVER PROJECT.** The Salt River Project is a comprehensive water storage and distribution system constructed and owned by the United States pursuant to the Reclamation Act of 1902 as amended. The source of the system's water is a 13,000 square mile mountainous area which drains into the Salt River and tributaries. Water is stored behind four dams on the Salt River and two on the Verde River which have an aggregate capacity of 2,063,948 acre feet. This water is distributed within the 360 square mile Salt River Valley through the Project's canal system. Water is fed into the canals from the Granite Reef Diversion Dam situated in the eastern part of the plaintiff's reservation. In a typical year the Project delivers in the Salt River Valley, net of losses from seepage and evaporation, about one million acre feet of which more than 75% is for agriculture and lawn care and less than 25% is delivered to cities (Phoenix, Scottsdale and others) for municipal and industrial uses. The Salt River Project is also the largest power utility in Arizona. The four Salt River dams have hydroelectric facilities; the Project operates four thermal plants in the Salt River Valley; it has participation interests in six other thermal plants; and it markets power from the Bureau of Reclamation dams on the Colorado River. Its gross revenues exceed $700 million per annum from power sales and are less than $10 million from water deliveries. From the inception of the Salt River Project the major costs of delivering water have been paid by the United States and by power consumers.

5. **MANAGEMENT OF THE SALT RIVER PROJECT.** The Interior Department constructed the original Project facilities and acquired the Salt River Valley canal distribution system during the period 1904-1911. It directly operated the system until it transferred its care, operation and

maintenance to the Salt River Valley Water Users' Association (hereafter sometimes referred to as the "Association"), a corporation organized under the laws of the Arizona Territory in 1903. This transfer was effected by a contract dated September 6, 1917, pursuant to the authority of the proviso clause of Section 5 of the Reclamation Extension Act of August 13, 1914, 38 Stat. 687, 43 U.S.C. §499. Under supplemental contracts dated March 22, 1937, February 28, 1944, and September 12, 1949, there was substituted for the Association the Salt River Project Agricultural Improvement and Power District (hereafter referred to as the "District"), a municipality organized under Arizona law. The Association continues to operate the Project's water system as agent for the District and the District operates the electrical power system. The plaintiff and its members residing on the reservation are exluded from participation in both the Association and the District. The transfer of the care, operation and maintenance of the Salt River Project to the Association and the District did not diminish the Secretary's obligation to administer it in accordance with governing federal law.

6. **THE PLAINTIFF'S LAWFUL ENTITLEMENT TO SALT RIVER WATER CONTROLLED BY THE SALT RIVER PROJECT.** The plaintiff is entitled to have water from the Salt River delivered to its lands by the Salt River Project to the extent of the following specific water rights:

A. The Executive Order of June 14, 1879, creating the plaintiff's reservation reserved from the unappropriated water of the Salt River sufficient water for the productive irrigation of all of the reservation's practicably irrigable lands. The net amount of the practicably irrigable lands is 28,000 acres and the duty of water for these lands is 6 acre feet per acre per year. The annual entitlement of water under this reserved right is 168,000 acre feet per year.

B. A decree of the District Court of the Third Judicial District of the Territory of Arizona, entered on March 1, 1910, in the Case of *Hurley v. Abbott, et al.*, No. 4564, deter-

mined that certain specified lands on the plaintiff's reservation allotted to individual Indian owners had a right to 12,670 acre feet per year which was prior in time to all other water rights in the Salt River Valley; and that certain other specified lands of individual Indians later brought into the reservation had a right as of 1878 to 6,055 acre feet.

C. The Act of May 18, 1916, 39 Stat. 123, directed the Secretary to provide a perpetual water right from the works of the Salt River Project for 631 ten acre allotments. With a duty of water of 6 acre feet per acre this statutory entitlement amounts to 37,860 acre feet per year for allotted lands.

D. The plaintiff's land are entitled to share in the water developed by storage in the Salt River Project reservoirs on the same basis as lands owned by non-Indians. This constitutes an entitlement to deliveries of developed water to supplement the water rights described in subparagraphs A, B and C to the extent that such water may be required for the proper irrigation of plaintiff's practicably irrigable lands and subject to its availability on a rational, non-discriminatory sharing basis.

7. **THE SECRETARY HAS WRONGFULLY REFUSED TO SATISFY THE PLAINTIFF'S WATER RIGHTS.** The Secretary has consistently followed a policy of violating federal law in administering the Salt River Project by refusing to deliver water to satisfy the Plaintiff's water rights in the following respects:

A. The Secretary has never satisfied the plaintiff's federal reserved rights as described in subparagraph 6A. He has moreover consistently refused to acknowledge the existence of such federal reserved rights.

B. The Secretary does acknowledge the validity of the water rights decreed to allotted lands in *Hurley v. Abbott* as described in subparagraph 6B. In most years however he has failed to satisfy these rights fully. In 1980 for instance, the shortfall was about 8,000 acre feet.

C. The Secretary has never complied with the mandate of the Act of May 18, 1916, as described in subparagraph 6C. During the period 1916 through 1938 the Secretary refused to deliver any part of this water right. Since 1939 the Secretary has delivered approximately 20,000 acre feet per year in partial satisfaction of this right from water developed by storage in the Salt River Project's Bartlett Dam on the Verde River.

D. The Secretary denies the plaintiff and its members the right to share in the water developed by storage or otherwise to participate in the benefits of the Salt River Project by excluding the plaintiff's lands from the Project's water service area and by denying its members the right to vote in the Project's managing council elections. Of all the lands within the boundaries of the Salt River Project only plaintiff's lands are exluded from the Project's service area. Of all the people residing within the boundaries of the Salt River Project only the Indian members of the plaintiff's community are denied the voting franchise in elections for the Project's governing board. The systematic exclusion of Indians from Project participation is based on an order issued by the Secretary on April 14, 1914. The only stated reason for the Indian exclusion was that there was insufficient Project water to irrigate all Project lands. But non-water right lands owned by white people forty to fifty miles away from the Project water source have always been served water while Indian lands contiguous to the source have never been cultivated; and 185,000 acre feet of Project water is being delivered annually as "surplus" water to lands outside the Project boundaries. In exclusively selecting Indians and Indian lands for exclusion from Salt River Project benefits the Secretary maintains an invidious racial discrimination which violates the due process clause of the Fifth Amendment to the United States Constitution.

8. **THE SALT RIVER PROJECT'S ILLEGAL WATER DELIVERY CONTRACTS.** The plaintiff's rights to water as described in subparagraphs 6 A, B and C, and its right to share in water developed by Project storage as described in

subparagraph 6D, are impaired and diminished by water delivery contracts and arrangements which violate the reclamation laws. The illegal contracts and delivery arrangements are as follows:

A. The Secretary causes to be delivered to the Roosevelt Water Conservation District (RWCD) approximately 40,000 acre feet of Salt River water per year under color of a contract dated October 24, 1924, between RWCD and the Salt River Valley Water Users' Association which was approved by the Secretary. This contract was materially superseded by a stipulation and decree entered in the Superior Court of Maricopa County, Arizona, on September 19, 1940, in the case of *Lehane v. Salt River Valley Water Users' Association,* No. 32021C. RWCD is a farm irrigation district lying wholly outside the Salt River Project district and the exclusive statutory authority for deliveries to it is the Warren Act of February 21, 1911, 36 Stat. 925, 43 U.S.C. §§523-524. The RWCD arrangement patently violates the Warren Act. The Act authorizes the Secretary to enter into delivery contracts. The Secretary or his delegate is not a party to the RWCD contract and he was not a party in the *Lehane* litigation. The Warren Act permits deliveries only of water which is excess to the requirements of Project lands. There can be no excess Salt River Project water for delivery to RWCD as long as the Secretary refuses to deliver water to plaintiff's uncultivated lands within the Project district. The water payment terms of the RWCD contract do not comply with the requirements of the Warren Act. The amount of water delivered to RWCD is twice that provided for in the *Lehane* stipulation and decree. The plaintiff petitioned the Secretary on March 27, 1980, to review the RWCD delivery arrangement and the Secretary did not respond to that petition.

B. The Secretary permits the Roosevelt Irrigation District (RID) to remove 145,000 acre feet per year of groundwater from the Salt River Project District under color of an agreement between RID and the Salt River Valley Water Users' Association dated August 25, 1921, and amended by agreements dated February 12, 1927 and May 31, 1950, all of

which have been approved by the Secretary. RID is a farm irrigation district lying wholly outside the Salt River Project District and the exclusive statutory authority for deliveries to it is the Warren Act of February 21, 1911. The Act authorizes the Secretary to enter into delivery contracts. The Secretary is not a party to the RID contracts. The Warren Act permits deliveries only of water which is excess to the requirements of Project lands. The water delivered to RID is not excess water because the Secretary has no water to deliver to the plaintiff's uncultivated lands within the Project. Moreover, the illegal RID pumping on Project lands has devastatingly depleted Project groundwater resources to the extent of several millions of acre feet and its continuation is irrational and destructive. The plaintiff petitioned the Secretary on March 27, 1980, to review the RID delivery arrangement and the Secretary did not respond to that petition.

C. The Secretary delivers approximately 200,000 acre feet per year to cities within the Project's boundaries. Deliveries to the City of Phoenix were made originally pursuant to a contract with the Salt River Valley Water Users' Association dated January 1, 1952, which was renewed by contract dated December 30, 1969, for an additional 25 years commencing January 1, 1977. Similar contracts with the Cities of Tempe, Peoria, Gilbert, Mesa, Chandler and Scottsdale expired on December 31, 1976, but deliveries to them continued under informal arrangements. These delivery arrangements violate Secion 9(c) of the Reclamation Project Act of 1939, 53 Stat. 1194, 43 U.S.C. §485h(c), which governs deliveries for municipal water supply. Section 9(c) authorizes the Secretary to enter into delivery contracts. The Secretary or his delegate is not a party to the contractual arrangements with the cities in the Salt River Project. Section 9(c) prohibits sales to cities which impair the efficiency of the Project for irrigation purposes. These delivery arrangements do impede the irrigation purpose of the Project because there is inadequate water to satisfy the requirements and needs of the plaintiff's lands. Section 9(c) as consistently interpreted

and put in practice by the Secretary in other reclamation projects, requires the pricing system for sales of water to cities to cover an appropriate portion of the full cost of project construction with interest and the full cost of delivering the water. The pricing system for the cities in the Salt River Project covers only a minor portion of these actual costs because they reflect substantial federal and power revenue subsidies. The plaintiff petitioned the Secretary on March 27, 1980, to review this arrangement and the Secretary did not respond to this petition.

D. The Secretary permits by tacit acquiescence contracts for the sale of more than 100,000 acre feet of return flow Project effluent water for remote non-Project uses in violation of the Warren Act, in disregard of a specific mandate of Congress, and in disregard of the expressed concerns of responsible Department officials. The return flow effluent is the discharge from the water treatment plants operated by the cities in the Project area. Almost all of this water originated from Project sources and, after its first-use purposes are concluded, remains Project water subject to the terms of the Warren Act and other Congressional directives. The Congress specifically enjoined the Secretary from abandoning this resource in Senate Report No. 408, dated July 26, 1967, and H.R. Report No. 1312, dated April 24, 1968. This water is being temporarily transported by the cities to the Buckeye Irrigation District which lies wholly outside the boundaries of the Salt River Project. Its permanent disposition is purportedly governed by a contract dated April 23, 1973 between the cities, as seller, and the Salt River Project Agricultural Improvement and Power District and Arizona Public Service, as buyers. Under this contract the Project's return flow effluent will be transported to an area 50 miles from the Project boundaries for use by an atomic power plant which is being constructed for the primary purpose of selling power to California and Texas. This contract was not presented to the Secretary for formal approval because responsible Department officials deemed it illegal. The only lawful and rational use of this return flow is

to retain it in Project lands to ease the Project's severe groundwater depletion. The plaintiff petitioned the Secretary on March 27, 1980 to review this arrangement and the Secretary did not respond to that petition.

E. The Secretary permits and condones the delivery of approximately 100,000 acre feet of water per year for country clubs, parks and residential lawn care contrary to the lawful requirement that Project water be first applied to serve the agricultural entitlements and needs of Project lands.

WHEREFORE the Plaintiff prays for the following relief:

1. That the Court issue an order to the Secretary of the Interior requiring him to show cause at a stated time and place why he should not respond to the prior petitions of the Plaintiff and why specifically he should not be required:

A. To determine and declare the reserved rights of the plaintiff's lands in the flow of the Salt River and to take all necessary actions to secure, protect and enforce those rights;

B. To determine and declare the rights of allotted lands on the plaintiff's reservation to the 18,725 acre feet per year decreed in the case of *Hurley v. Abbott* and to take all necessary actions to secure, protect and enforce those rights;

C. To determine and declare the rights of 631 ten acre allotments on the plaintiff's reservation to a perpetual right to 37,860 acre feet per year of water from the Salt River Project as provided in the Act of May 18, 1916, and to take all necessary actions to secure, enforce and protect those rights;

D. To cancel the order of April 14, 1914, excluding the plaintiff's lands from participation in the Salt River Project;

E. To review the water delivery contracts and arrangements of the Salt River Project as described in subparagraphs 8A, B, C, D, and E; to determine and declare the extent to which they comply or fail to comply with the governing reclamation statutes; and to take all necessary actions to suspend or modify them as required by law;

2. That the Court review these determinations, declarations, and actions; that it make a declaration as to their lawfulness; and that it issue orders as may be necessary to assure that the Secretary takes all further action that may be required to comply with the laws governing the administration of the Salt River Project; and

3. That the plaintiff be granted all other relief as may appear just and that it be awarded its costs.

**SECOND CLAIM FOR RELIEF**
(For Declaratory Judgment and Injunction)

**I**

This is a claim for a declaration that the plaintiff has certain prescribed entitlements to Salt River Project water and other project benefits which are being denied and for an injunction to prohibit the continued denial of such entitlements. The plaintiff's entitlements are based upon the federal law of reserved water rights as defined in *Winters v. United States*, 207 U.S. 564 (1908); the Act of May 18, 1916, 39 Stat. 123; and the right under the Fifth Amendment to the United States Constitution not to be excluded on invidious racial grounds from participation in the benefits of a federal reclamation project established pursuant to the Reclamation Act of June 17, 1902, 32 Stat. 388, 43 U.S.C. §§391 et seq., as amended. This Court's jurisdiction is conferred by 28 U.S.C. §1362.

**II**

(a) The plaintiff is a community of American Indians organized under Section 16 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 987, 25 U.S.C. §476. It administers a reservation consisting of approximately 50,000 acres in Maricopa County, Arizona. A substantial portion of this reservation is practicably irrigable land located within the boundaries of the Salt River Project.

(b) The defendant Salt River Project Agricultural Improvement and Power District is a municipal corporation organized under Chapter 4, Title 45, Arizona Revised Stat-

ues. It operates the Salt River Project, a federal reclamation project, under contracts with the United States.

(c) The defendant Salt River Valley Water Users' Association is an Arizona corporation which is an agent of the Salt River Project Agricultural Improvement and Power District for the purpose of carrying out the project's water storage and delivery functions.

**III**

The plaintiff's reservation lands have the following entitlements to water deliveries from the Salt River Project:

(a) An entitlement under a federal reserved right to sufficient water to irrigate 28,000 acres of practicably irrigable lands from the water of the Salt River which was unappropriated on June 14, 1879, when this right was reserved.

(b) An entitlement under the decree of March 1, 1910, in the case of *Hurley v. Abbott*, et al., No. 4564, in the District Court of the Third Judicial District of the Territory of Arizona, in 12,670 acre feet per year for certain specified lands alloted to individual Indians with a priority date prior to all other water rights in the Salt River Valley; and in 6,055 acre feet per year in certain other specified lands allotted to individual Indians, which were later brought into the reservation, with a priority date of 1878.

(c) An entitlement under the Act of May 18, 1916, 39 Stat. 123, to a perpetual water right from the works of the Salt River Project for 631 ten acre allotments.

(d) An entitlement to water deliveries to reservation lands within the Salt River Project on exactly the same basis as all other lands in the Salt River Project.

**IV**

The Salt River Project Agricultural Improvement and Power District and the Salt River Valley Water Users' Association refuse to deliver water to plaintiff's lands in accordance with the entitlements described in Paragraph III above. Particularly, they refuse to recongnize to any extent whatever the entitlement described in paragraph IIIA; they

purport to recognize the entitlement described in paragraph IIIB but they consistently fail to satisfy this entitlement in full; they consistently fail to satisfy the entitlement described in paragraph IIIC to the extent of 18,000 acre feet per year; and they exclude Indian lands within the Salt River Project from sharing in the water delivery benefits that are accorded to all other lands in the Salt River Project.

V

The Salt River Project Agricultural Improvement and Power District and the Salt River Valley Water Users' Association impose an invidious discrimination upon the members of the plaintiff's community residing within the Salt River Project by denying them the right to vote in their public elections and denying them the right to hold seats on their management councils.

WHEREFORE, the plaintiff prays that the Court declare the extent of the plaintiff's rights in Salt River Project water and the right of its members to participate in the government of the Salt River Project and that it issue an injunction of the continued refusal of the defendants to recognize these rights.

**THIRD CLAIM FOR RELIEF**

(For Declaratory Judgment and Injunction)

I

This is a claim for a declaration that an agreement for the delivery of reclamation project water is illegal and for an injunction against the continued implementation of it. The question of the validity of the agreement is governed by the Reclamation Act of June 17, 1902, 32 Stat. 388, 43 U.S.C. §§391 et seq., as amended, and by the Warren Act of February 21, 1911, 36 Stat. 925, 43 U.S.C. §§523-525. This Court's jurisdiction is conferred by 28 U.S.C. §1362.

II

(a) The plaintiff is a community of American Indians organized under Section 16 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 987, 25 U.S.C. §476. It

administers a reservation consisting of approximately 50,000 acres in Maricopa County, Arizona. A substantial portion of this reservation is practicably irrigable land located within the boundaries of the Salt River Project. Some of these reservation project lands receive varying amounts of Salt River Project water depending on the amount of water available in the system and the extent of the competing demands for such water. Other irrigable reservation project lands receive no project water for the purported reason that there are higher and prior water rights that must be served first.

(b) The defendant Salt River Project Agricultural Improvement and Power District is a municipal corporation organized under Chapter 4, Title 45, Arizona Revised Statutes. It operates the Salt River Project, a federal reclamation project, under contracts with the United States.

(c) The defendant Salt River Valley Water Users' Association, hereafter referred to as the Association, is an Arizona corporation which is an agent of the Salt River Project Agricultural Improvement and Power District for the purpose of carrying out the project's water storage and delivery functions.

(d) The Roosevelt Water Conservation District, hereafter referred to as RWCD, is a municipal corporation organized under Chapter 6, Title 45, Arizona Revised Statutes, It is an irrigation district of about 40,000 acres located in Maricopa County and outside the boundaries of the Salt River Project.

**III**

The Association delivers to RWCD about 40,000 acre feet of Salt River water per year under color of a contract between the Association and RWCD dated October 24, 1924, as materially modified by a stipulation and decree entered in the Superior Court of Maricopa County, Arizona on September 19, 1940, in the case of *Lehane v. Salt River Valley Water Users' Association*, No. 32021C. This contractual arrangement is illegal because it violates the Act of February 21, 1911 (the Warren Act), 36 Stat. 925, 43 U.S.C.

§§523-524, in the following particulars: (1) the Warren Act authorizes only the Secretary of the Interior to contract for the delivery of project water to outlying irrigation districts and the Secretary of the Interior was not a party to the contract of October 24, 1924, and was not a party in the *Lehane* litigation; and (2) the Warren Act authorizes the delivery of water to outlying irrigation districts only to the extent such water is in excess of the requirements of project lands and there is in fact no excess water because certain of plaintiff's project lands are denied deliveries.

IV

Aside from the legality of the water delivery arrangement as described in paragraph III above, the amount of water delivered by the Association to RWCD is very substantially in excess of the amount prescribed in the stipulated decree entered in the *Lehane* litigation. That decree specifies a delivery to RWCD of 5.6% of water diverted at Granite Reef Dam for Association irrigation use. This amount does not exceed 15,000 acre feet per year. Thus, even if the water delivery arrangement between the Association and RWCD were authorized by law, the deliveries to RWCD exceed its entitlement by at least 25,000 acre feet per year.

V

The illegal deliveries of project water to RWCD lessen the amount of water available for plaintiff's lands within the project and result in direct and material injury to the plaintiff for which there is not an adequate remedy at law.

WHEREFORE the plaintiff prays that the Court declare that the arrangement under which the Salt River Valley Water Users' Association delivers water to the Roosevelt Water Conservation District is illegal and that it issue an injunction against the continuation of this arrangement; or alternatively that it enjoin the delivery of excessive amounts of water by the Salt River Valley Water Users' Association to the Roosevelt Water Conservation District; and that the plaintiff be awarded its costs and expenses.

**FOURTH CLAIM FOR RELIEF**
(For Declaratory Judgment and Injunction)

**I**

This is a claim for a declaration that an agreement for the delivery of reclamation project water is illegal and for an injunction against the continued implementation of it. The question of the validity of the agreement is governed by the Reclamation Act of June 17, 1902, 32 Stat. 388, 43 U.S.C. §§391 et seq., as amended, and by the Warren Act of February 21, 1911, 36 Stat. 925, 43 U.S.C. §§523-525. This Court's jurisdiction is conferred by 28 U.S.C. §1362.

**II**

(a) The plaintiff is a community of American Indians organized under Section 16 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 987, 25 U.S.C §476. It administers a reservation consisting of approximately 50,000 acres in Maricopa County, Arizona. A substantial portion of this reservation is practicably irrigable land located within the boundaries of the Salt River Project. Some of these reservation project lands receive varying amounts of Salt River Project water depending on the amount of water available in the system and the extent of the competing demands for such water. Other irrigable reservation project lands receive no project water for the purported reason that there are higher and prior water rights that must be served first.

(b) The defendant Salt River Project Agricultural Improvement and Power District is a municipal corporation organized under Chapter 4, Title 45, Arizona Revised Statutes. It operates the Salt River Project, a federal reclamation project, under contracts with the United States.

(c) The defendant Salt River Valley Water Users' Assso-ciation, hereafter referred to as the Association, is an Arizona corporation which is an agent of the Salt River Project Agricultural Improvement and Power District for the purpose of carrying out the project's water storage and delivery function.

(d) The Roosevelt Irrigation District, hereafter referred to as RID, is a municipal corporation organized under Chapter 6, Title 45, Airozna Revised Statutes. It is an irrigation district of about 38,000 acres located in Maricopa County and outside the boundaries of the Salt River Project.

III

The Association delivers to RID about 145,000 acre feet of project water per year pursuant to an agreement dated August 25, 1921, and amended by agreements dated February 12, 1927 and May 31, 1950. This contractual arrangement is illegal because it violates the Act of February 21, 1911 (the Warren Act), 36 Stat. 925, 43 U.S.C. §§523-524, in the following particulars: (1) the Warren Act authorizes only the Secretary of the Interior to contract for delivery of project water to outlying irrigation districts and the Secretary of the Interior was not a party to the contracts of August 25, 1921, February 12, 1927, and May 31, 1950; and (2) the Warren Act authorizes the delivery of water to outlying irrigation districts only to the extent such water is in excess of the requirements of project lands and there is in fact no excess water because certain of plaintiff's project lands are denied deliveries.

IV

The illegal deliveries of project water to RID lessen the amount of water available for plaintiff's lands within the project and result in direct and material injury to the plaintiff for which there is not an adequate remedy at law.

WHEREFORE the plaintiff prays that the Court declare that the arrangement under which the Salt River Valley Water Users' Association delivers water to the Roosevelt Irrigation District is illegal and that it issue and injunction against the continuation of the arrangement and that the plaintiff be awarded its costs and expenses.

**FIFTH CLAIM FOR RELIEF**
(For Declaratory Judgment and Injunction)

I

This is a claim for a declaration that an agreement for the sale of effluent water for use in the operation of the Palo Verde Nuclear Generating Station is illegal and for an injunction against the implementation of it. The question of the validity of the agreement is governed by the Reclamation Act of June 17, 1902, 32 Stat. 388, 43 U.S.C. §§391 et seq., as amended; the Reclamation Project Act of August 4, 1939, 53 Stat. 1187, 43 U.S.C. §§485 et seq.; and the Colorado River Basin Project Act of September 30, 1968, 82 Stat. 885.

II

(a) The plaintiff is a community of American Indians organized under Section 16 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 987, 25 U.S.C. §476. It administers a reservation consisting of approximately 50,000 acres in Maricopa County, Arizona. A substantial portion of this reservation is practicably irrigable land located within the boundaries of the Salt River Project. Some of these reservation project lands receive varying amounts of Salt River Project water depending on the amount of water available in the system and the extent of the competing demands for such water. Other irrigable reservation project lands receive no project water for the purported reason that there are higher and prior water rights that must be served first.

(b) The effluent water sellers are: The City of Phoenix, the City of Glendale, the City of Scottsdale, the City of Mesa, the City of Tempe, and the Town of Youngtown which are Arizona municipal corporations that share in the ownership of the 91st Avenue Plant, a waste water treatment plant.

(c) The Palo Verde Nuclear Generating Station owners and their percentage interests are: Arizona Public Service Company, an Arizona corporation, (29.1%); Salt River Proj-

ect Agricultural Improvement and Power District, a municipal corporation organized under Chapter 4, Title 45, Arizona Revised Statutes, (29.1%); Sothern California Edison Company, a California corporation, (15.8%); Public Service Company of New Mexico, a New Mexico corporation, (10.2%); and El Paso Electric Company, a Texas corporation, (15.8%).

(d) There are executory contracts for the purchase of interests in the Palo Verde Nuclear Generating Station as follows: Department of Water and Power of the City of Los Angeles, has contracted to purchase a 5.7% interest from Salt River Project Agricultural Improvement and Power District; Southern California Public Power Authority, a joint powers agency created pursuant to the California Joint Exercise of Powers Act, has contracted to purchase a 5.91% interest from Salt River Project Agricultural Improvement and Power District; and M-S-R Public Power Agency, a joint powers agency created pursuant to the California Joint Exercise of Powers Act, has contracted to purchase a 3.95% interest from El Paso Electric Company.

III

By instrument entitled Agreement No. 13904 Option and Purchase of Effluent, dated April 23, 1973, the Cities of Phoenix, Glendale, Mesa, Scottsdale, Tempe and the Town of Youngtown granted an option to Arizona Public Service Company and Salt River Project Agricultural Improvement and Power District to purchase 35,000 acre feet of effluent water per year from the 91st Avenue waste water treatment plant for each of five planned generating units of the Palo Verde Nuclear Generating Station. There are presently under construction three generating units scheduled for completion in 1983, 1985, and 1986 and under the authority of this agreement the Palo Verde Nuclear Generating Station owners are planning to purchase 35,000 acre feet of effluent for the first unit beginning in 1983; 70,000 acre feet for two units beginning in 1985; and 105,000 acre feet for three units beginning in 1986.

IV

The effluent water which is the subject of the agreement dated April 23, 1973 is predominantly Salt River Project water. At least 60% of it is originally delivered to the cities by the Salt River Project Agricultural Improvement and Power District; and at least 30% of it is originally groundwater pumped by the cities within the boundaries of the Salt River Project. Following its use for municipal purposes it is susceptible of being recaptured for further beneficial use. It is accordingly subject to the federal reclamation laws and is particularly subject to the constrictions of Section 9(c) of the Reclamation Project Act of 1939, 53 Stat. 1189, 43 U.S.C. §485h(c).

V

The agreement of April 23, 1973, is illegal in that: (1) project water cannot be sold for power generation when there is insufficient project water to satisfy project irrigation needs; and (2) project water cannot be sold or disposed of for purposes other than project irrigation except by contract executed by the Secretary of the Interior.

VI

The proposed sale of project effluent water under the agreement of April 23, 1973, lessens the amount of water available for plaintiff's lands within the project and results in direct and material injury to the plaintiff for which there is not an adequate remedy at law.

WHEREFORE the plaintiff prays that the Court declare that the arrangement under which the effluent water sellers propose to deliver water to the owners of the Palo Verde Nuclear Generating Station is illegal and that it issue an injunction against the continuation of this arrangement.

SHEA & WILKS

By /s/ PHILIP J. SHEA

PHILIP J. SHEA
Attorney for Plaintiff
114 West Adams, Suite 200
Phoenix, Arizona 85003

*List of Parents, Subsidiaries (Other than Wholly-Owned) and Affiliates Pursuant to Supreme Court Rule 28.1*

*Arizona Public Service Company:*

Nuclear Assurance Corporation

*Southern California Edison Company:*

Associated Southern Investment Company
Associated Southern Engineering Company
Bear Creek Uranium Company
Calabasas Communications Company
Calabasas Park Company
Calabasas Park Company, Inc.*
California Electric Power Company*
Conservation Financing Corporation
Electric Systems Company
Energy Services, Inc.
Kern River Cogeneration Company
Mono Green Mountain Company*
Mono Power Company
Mono Power Company (Bolivia)*
Mono Power Company (Italy)*
Mono Power Company (Nicaragua)*
Mono Power Company (Papau, New Guinea)*
Mono Power Company (Peru)*
Renewable Energy Capital Company
Rocky Mountain Energy Company — Mono Power Company
Halliburton Company Uranium Partnership
SCE Capital Company
Southern California Edison Finance Company N.V.
Southern Sierra Energy Company
Southern Surplus Realty Company

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* Inactive

*Public Service Company of New Mexico:*
Zwan Magnetics, Incorporated
Bellamah Community Development, a partnership
Montana de Fibra, a joint venture
La Plata Partnership

*El Paso Electric Company:*
None

*Department of Water and Power of the City of Los Angeles:*
None

*Southern California Public Power Authority:* [1]
Department of Water and Power of the City of Los Angeles
City of Colton
City of Anaheim
City of Azusa
City of Pasadena
City of Riverside
City of Vernon
City of Burbank
City of Banning
City of Glendale
Imperial Irrigation District

[1] The entities listed are the current members of Southern California Public Power Authority, a joint powers agency.

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FILED
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No. 84-875

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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ARIZONA PUBLIC SERVICE COMPANY, ET AL,
Petitioners,
versus
SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,
Respondent.

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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## RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether respondent, which has irrigable land lying within the Salt River Project, a federal reclamation project, has standing to challenge a contract for the illegal delivery of project water for non-project purposes, where such illegal delivery impacts adversely and uniquely on the amount of water delivered to the respondent's project land.

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## RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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The respondent, Salt River Pima-Maricopa Indian Community, submits this brief in opposition to the petition for writ of certiorari to the Ninth Circuit Court of Appeals.

## STATEMENT OF THE CASE

The petition seeks interlocutory review of a portion of a case that was remanded by the Court of Appeals. The petitioners are not now being restrained in any fashion from conducting business as usual nor is any interim restraint being sought.

The question presented is whether the respondent has alleged standing to assert its claim against the petitioners. The case, though commenced three years ago, has not progressed beyond the pleading stage. Accordingly, resolution of the question entails reading and interpreting the complaint and nothing more. The parties are in total agreement on the legal standard applicable to the question. The Court of Appeals, recognizing that this is a *sui generis* interpretation of a pleading, made its decision in an unpublished memorandum which has no effect as precedent in other cases.

This petition deals only with one, i.e. the fifth, of five claims for relief which are stated in the complaint. The Fifth Claim for Relief is a challenge to the validity of a certain contract for the sale of federal reclamation project water for a nuclear power plant outside of the boundaries of the project. The contract sellers of this project water are six cities situated within the project boundaries; the contract buyers are two Arizona utilities, Arizona Public Service Company and Salt River Project Agricultural Improvement and Power District. All of the eight parties to the contract are parties to the Fifth Claim but only one of them, Arizona Public Service Company, is a petitioner here. The other petitioners are out-of-state utilities that own fractional interests in the power plant.

The five claims in the complaint are tightly interrelated. The First Claim for Relief, directed only against the Secretary of the Interior and the United States, seeks an Admin-

istrative Procedure Act review of allegedly illegal actions of the Secretary of the Interior which cause great injury to the respondent. The other four claims are directed against other defendants whose joinder is required to remedy the wrongs alleged in the First Claim. Accordingly, the Fifth Claim for Relief, which is in issue here, should be read in conjunction with the related allegations in the First Claim.

The First Claim states: that the respondent's reservation land lies within the boundaries of the Salt River Project, a federal reclamation project within the statutory jurisdiction of the Secretary of the Interior; that all of the non-reservation land within the project receives project irrigation benefits but that the respondent's project land is uniquely excluded by order of the Secretary; that the only stated reason for the discriminatory exclusion of this Indian land is that there is an insufficiency of project water; that the Secretary has approved or acquiesced in three contracts for delivery of 185,000 acre feet of water annually to users outside of the project boundaries; that the laws governing federal reclamation projects authorize delivery contracts such as these only where the water is surplus to the agricultural needs of the project; that since respondent's land is excluded from the project because of a supposed shortage of water, these contracts are illegal; that one of the three contracts is the contract for the sale by the project cities of wastewater effluent, which is at least 90% project water, to an off-project nuclear power plant; and that the federal reclamation laws require that this project water be recaptured for use on project lands.

The Fifth Claim is directed against the parties to the wastewater effluent contract and against other utilities with ownership interests in the power plant. It tracks the allegations of the First Claim regarding this contract, and alleges that the contract is illegal and that it directly injures the respondent by lessening the amount of water available to it.

As shown in the trial court's Memorandum Opinion and Order, the petitioners moved to dismiss the complaint on the grounds, among others, that the respondent failed to join indispensable parties as required by Rule 19, Federal Rules of Civil Procedure. They did not contend there that the respondent lacked standing.

## WHY THE COURT SHOULD DENY THE PETITION

### A. The Issue is Without any Significance Beyond this Case.

The Ninth Circuit decision which the petitioners want reviewed is nothing more than the law of this case pending an evidentiary hearing. It has no impact on any other litigation. It was issued in the form of an unpublished memorandum under Rule 21(c), Rules of the Ninth Circuit Court of Appeals. This means that all three members of the panel agreed that the decision has no precedent value.

There is no issue of law presented by the petition. We all agree that there must be a cause-effect relation between the effluent water delivery contract and the deprivation suffered by the claimant. We join the petitioners in support of the principles of *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982) and the other standing cases. The issue is whether, under the particular facts of this case, the claim for relief pending in the trial court against the petitioners and others meets the test of those cases.

### B. The Question Presented is not Ripe for Review.

The misunderstanding as to the interpretation of the complaint will probably be resolved and will certainly be clarified by trial court findings based upon an evidentiary record. When the trial court proceedings are completed all the questions that may be raised by all the parties, including the standing question raised by the petitioners, will be open to appellate review. In the meantime the petitioners are not burdened by any restraint and they are free to conduct business as usual.

After this controversy passes through the trial process the significant questions in the litigation will become distilled from the evidentiary record. Then we can focus on such questions as: Was there a rational basis in fact and law for the denial of project benefits uniquely to Indian lands; Is the Secretary obligated to enlarge project water supplies to serve Indian project lands by recapturing project sewage effluent under the rule of *Ide v. United States,* 263 U.S. 497 (1924); and is the Secretary's duty and discretion as to deliveries of project effluent for power generation purposes constrained by Section 9(c) of the Reclamation Project Act of 1939, 53 Stat.1187, 43 U.S.C.§485h(c). The question presented in the petition is of *de minimis* importance compared to the real issues that have yet to be confronted.

## CONCLUSION

For these reasons the respondent requests that the petition be denied.

Respectfully submitted,

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Counsel of Record
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Office - Supreme Court, U.S.
FILED
FEB 19 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-875

# In the Supreme Court of the United States

OCTOBER TERM, 1984

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ARIZONA PUBLIC SERVICE CO., ET AL., PETITIONERS

*v.*

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## MEMORANDUM FOR THE FEDERAL RESPONDENTS

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REX E. LEE
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

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# In the Supreme Court of the United States

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## MEMORANDUM FOR THE FEDERAL RESPONDENTS

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Petitioners contend that the court of appeals erred in ruling that respondent Salt River Pima-Maricopa Indian Community has standing to assert a claim for cancellation of a contract for the delivery of wastewater from a sewerage treatment plant to a nuclear power plant on the grounds that (1) the United States has unlawfully allowed the parties to that contract to divert the effluent from its required uses for respondents' reservation and (2) respondents cannot obtain complete relief on this claim without the presence of the petitioners.

1. a. The Salt River Pima-Maricopa Indian Community (Community) originally filed this action in

January, 1982, in the United States District Court for the District of Columbia against the United States and the Secretary of the Interior, seeking declaratory and injunctive relief from the Secretary's administration of the Salt River Project, a federal reclamation project in Arizona. The Secretary moved to transfer the case to the United States District Court for the District of Arizona so that other parties affected by the allocation of project water could intervene and protect their interests. Following the transfer of the action, the Community filed an amended complaint (Pet. App. C1-C21) naming additional defendants [1] and asserting five claims for relief.

The Community's first claim for relief is limited to the United States and the Secretary of the Interior. The Community alleged (Pet. App. C5) that the Secretary has violated federal law [2] in administering the Salt River Project, a federal reclamation project, by refusing to deliver project water to the Community. In particular, the Community claimed (Pet. App. C5-C6) that the Secretary has unlawfully excluded

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[1] The petitioners were named as additional defendants, as well as the Salt River Project Agricultural Improvement and Power District, the Salt River Valley Water Users' Association, the Roosevelt Water Conservation District, the Roosevelt Irrigation District, the Cities of Phoenix, Glendale, Scottsdale, Tempe, and Mesa, Arizona, the Town of Youngtown, Arizona, and M-S-R Public Power Agency (Pet. App. C1).

[2] The Community asserted (Pet. App. C2) that the Secretary has acted in violation of the Reclamation Act of 1902, 43 U.S.C. 391 *et seq.*; the Warren (Reclamation) Act, 43 U.S.C. 523-525; the Act of May 18, 1916, ch. 125, § 2, 39 Stat. 130; the Reclamation Project Act of 1939, 43 U.S.C. 485 *et seq.*; and the Due Process Clause of the Fifth Amendment.

Community land from participation in the Salt River Project and has refused to satisfy the Community's water rights.[3] The Community also alleged (Pet. App. C6-C7) that the Secretary has approved or acquiesced in three water delivery contracts which violate federal reclamation laws and diminish project water supplies. Included among these contracts is the contract between the joint owners of the Palo Verde Nuclear Power Plant, including petitioners,[4] and the municipal defendants for the sale of wastewater effluent. The Community claimed (Pet. App. C9) that "[a]lmost all" of the effluent originated from Project sources, remains Project water, and is subject to control by the Secretary. Each of the three water delivery contracts[5] was alleged to violate fed-

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[3] The Community's alleged entitlement to additional quantities of water is based on the following claims: (1) that it has unquantified *Winters* doctrine (see *Winters* v. *United States*, 207 U.S. 564 (1908)) reserved water rights derived from the creation of the Salt River Indian Reservation; (2) that it is not receiving full satisfaction of the Indian water rights set forth in the 1910 Kent Decree of *Hurley* v. *Abbott*, No. 4564 (Ariz. Dist. Ct. Mar. 1, 1910); (3) that it is entitled to more water than it presently receives under the Act of May 18, 1916, ch. 125, §§ 1-2, 39 Stat. 123-130; and (4) that it has the right to share in the developed water created by the Salt River Project on the same basis as lands owned by non-Indian project members.

[4] The Salt River Project Agricultural Improvement and Power District owns a percentage of the nuclear power plant and is a party to the effluent supply contract, but is not a petitioner (see Pet. 5 n.2).

[5] The other two water delivery contracts are between the Salt River Water Users' Association and the Roosevelt Water Conservation District and between the Association and the Roosevelt Irrigation District. Although the court of appeals

eral reclamation law, and the Community sought to have the Secretary "take all necessary actions to suspend or modify them as required by law" (Pet. App. C10).

Only the Community's first claim seeks relief against the United States or the Secretary. The remaining four claims, the Community asserts (Br. in Opp. 3), "are directed against other defendants whose joinder is required to remedy the wrongs alleged in the First Claim." The Community's second claim for relief, brought against the Salt River Project Agricultural Improvement and Power District and the Salt River Valley Water Users' Association (Salt River Project defendants), repeated the first claim's request that the district court declare the extent of the Community's rights in the Salt River Project water and the right of the Community to membership in the Project. The Community's third, fourth, and fifth claims for relief sought declaratory relief invalidating the three water delivery contracts alleged to violate federal reclamation law. The fifth claim for relief, which concerned the effluent supply contract, alleged (Pet. App. C20) that the proposed sale of effluent "lessens the amount of water available for plaintiff's lands within the project and results in direct and material injury to the plaintiff for which there is not an adequate remedy at law."

b. On August 31, 1982, the Salt River Project defendants, joined by petitioners, moved to dismiss the Community's third, fourth, and fifth claims for

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held that the Community has standing to challenge these contracts as well as the effluent supply contract, only the issue of the Community's standing to challenge the latter is before the Court on this petition.

relief on several grounds.[6] The Roosevelt Water Conservation District also moved for dismissal, asserting that the Community lacked standing to challenge the legality of the three delivery contracts. The district court found (Pet. App. B8) that the Community lacks standing to challenge the contracts and dismissed the three claims of the amended complaint. Relying upon *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982), the district court

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[6] The movants argued that the action should be dismissed because (1) the doctrine of res judicata bars the Community from claiming water rights in addition to the rights determined in the Kent Decree of 1910; (2) the court should abstain in favor of either the continuing state jurisdiction over the Kent Decree or the pending state court general adjudication of water rights to the Gila River, including the Salt River and other tributaries; (3) the Community failed to join indispensable parties; (4) the court lacks jurisdiction to review the actions of the Secretary because such actions are committed to the Secretary's discretion; and (5) exclusive jurisdiction lies in the United States Claims Court (Pet. App. B2-B3).

The United States did not join in the motion to dismiss, and filed a memorandum with the district court taking issue with two of the movants' contentions. First, we disagreed with the res judicata argument that the Kent Decree included the federal reserved rights of the Community. In accordance with our position that the Kent Decree does not preclude the Community from claiming additional water rights in the Salt River, we informed the court that we intend to submit a claim for additional Salt River water on behalf of the Community in the Gila River state court adjudication if the state court is found to have jurisdiction. Second, we disagreed with the assertion that all aspects of the Secretary's administration of Salt River Project water rights are subject to the continuing jurisdiction of the state court with authority over the Kent Decree. The district court has recently dismissed the Community's claim based on the Kent Decree. See page 6 note 9, *infra*.

held (Pet. App. B7) that "the second requirement [of *Valley Forge*] that the challenged action cause the injury such that the remedy sought will likely redress the injury is not presented in the first amended complaint." The court rejected the Community's allegation that the contracts result in direct and material injury to the Community, finding that "[o]ther statements within the amended complaint confirm * * * that the contracts do not cause the Community's injury" (Pet. App. B7). The district court entered judgment pursuant to Fed. R. Civ. P. 54(b), dismissed the Community's third, fourth, and fifth claims for relief, and dismissed all parties other than the United States, the Secretary of the Interior, and the Salt River Project defendants.[7]

c. The Community appealed, and, in an unpublished memorandum opinion, the court of appeals, with one dissent, reversed and remanded (Pet. App. A1-A7). The court held (*id.* at A3-A5) that the district court had erred in concluding that there is an insufficient link between the challenged contracts and the injury the Community sought to redress. The court of appeals reasoned (*id.* at A3):

> [a] ruling on Counts I and II, that the Secretary is violating the Community's rights by its administration of the project and that the Community is entitled to more water than it is presently receiving, cannot afford full relief unless the contracts under which the water is being delivered outside the project are either invalidated or reformed.

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[7] The district court also granted the motion to dismiss insofar as the Community sought an adjudication of its water rights, on the ground that the Community had failed to join indispensable parties (Pet. App. B8). In all other respects, the district court denied the motion to dismiss (*ibid.*).

The court recognized that, under Rules 18 and 19 of the Federal Rules of Civil Procedure, a plaintiff must independently establish jurisdiction over added parties and claims, but the court found (Pet. App. A4) that "the contracts of the joined defendants are sufficiently related to the underlying dispute with the United States to provide the requisite standing." [8] The court therefore remanded the case to the district court.[9]

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[8] The court further noted that "[i]f the district court had doubts whether the relief requested by the Community required adjustment of the contract users' rights, the proper course would have been 'to defer decision until the action was further advanced' " (Pet. App. A3, quoting Fed. R. Civ. P. 19 advisory committee note at 56). Finally, the court of appeals noted (Pet. App. A5) that the district court should reconsider its abstention ruling in light of *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545 (1983).

In dissent, Judge Wallace agreed with the district court that "there is an insufficient causal link between the challenged contracts and the injury the Community sought to redress by filing this action" (Pet. App. A6). Judge Wallace also suggested (*id.* at A7) that, if the Community could not obtain complete relief without the presence in this suit of the parties to the water delivery contracts, the Community should have joined those parties in the Community's first and second claims for relief pursuant to Fed. R. Civ. P. 19.

[9] On January 29, 1985, after the petition was filed, the district court issued an order staying the Community's reserved rights claim and dismissing the claim based on the Kent Decree. Relying upon *Arizona* v. *San Carlos Apache Tribe*, *supra*, the court held that the reserved rights claim should be pursued in the pending state court adjudication if the state courts have concurrent jurisdiction over the Community's claims. Because that issue was pending before the Arizona Supreme Court, the district court decided to await the outcome of that suit before ruling on the abstention issue. However, the court held that the Community should look to

2. Petitioners contend that the court of appeals erred by holding that the Community has standing to assert a claim for cancellation of a contract for the delivery of wastewater from a treatment plant operated by several municipalities in the Phoenix metropolitan area to a nuclear power plant for cooling purposes. While the United States and the Secretary are respondents in this Court under this Court's Rule 19.6, neither the United States nor any of its officers or agencies is a party to any of the contracts which the court of appeals held that the Community has standing to challenge. The resolution of this issue thus has no bearing on the separate claims asserted by the Community against the United States, which remain in the district court. We therefore have no direct interest in the grant or denial of the petition. For that reason, we took no position in the court of appeals on the question whether the Community has standing to challenge the water delivery contracts, and we waived our right to file a response in this Court to the petition. However, the Court has now asked the Solicitor General to file a response to the petition. In our opinion, no further review of this case is necessary at this time.

Four allegations in the Community's amended complaint are pertinent to the questions presented by the petition. The Community alleged that (1) it is entitled to membership in the Salt River Project and is

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the state court with continuing jurisdiction over *Hurley* v. *Abbott*, *supra* for enforcement of rights established by the Kent Decree. The district court retained the Community's claims based on the Act of May 18, 1916, ch. 125, 39 Stat. 123 *et seq.*, and on its alleged entitlement to membership in the Salt River Project. The district court's memorandum opinion and order is reproduced in the addendum to this memorandum.

entitled to satisfaction of its water rights from the Salt River; (2) the wastewater that is the subject of the effluent supply contract "is predominantly Salt River Project water" (Pet. App. C20); (3) the effluent supply contract violates federal law because project water cannot be sold for power generation when there is insufficient project water to satisfy project irrigation needs;[10] and (4) the proposed sale of project effluent water, as well as the failure to recapture that water after its use, lessens the amount of water available within the project and results in direct and material injury to the Community.

The question of the Community's standing to challenge the effluent supply contract thus ultimately rests on the Community's contentions that it is entitled to membership in the project and that the effluent is project water subject to the control of the Secretary. We disagree with both assertions.[11] We also

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[10] The Community also alleged that the effluent supply contract is illegal because "project water cannot be sold or disposed of for purposes other than project irrigation except by contract executed by the Secretary of the Interior" (Pet. App. C20).

[11] In a related action currently pending in the United States District Court for the District of Arizona, the effluent supply contract has been challenged on the ground, inter alia, that the Secretary has authority over the reuse of the effluent to the extent it originated as project water. *Long* v. *Salt River Project Agricultural Improvement & Power District,* No. 83-2397 (filed Dec. 12, 1983). We have argued in *Long* that the disposition of Salt River Project effluent water is not controlled by the Secretary and is not preempted by federal law, but instead is subject to state law.

The Community also states that it has "irrigable land lying within the Salt River Project" (Br. in Opp. i). The Project's boundaries as delineated by the Secretary, however, do not encompass the Community's lands.

disagree with the allegation that the sale of the effluent, which is treated at a facility some 20 miles west and downstream (Pet. 6) from the Community, lessens the amount of water available to the Community and thereby results in direct and material injury. The Community may therefore be unable to establish a causal link between the effluent contract and the injury that the Community seeks to redress. Nonetheless, the Community's complaint does allege that the effluent is Salt River Project water that is being unlawfully diverted, rather than "being recaptured for further beneficial use" (Pet. App. C20). Because those allegations must be accepted as true at this stage of the proceedings (see *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975)), the court of appeals properly ruled that the Community should be allowed to go forward with its proof of these claims.

The court of appeals' decision does not depart from the principles in *Valley Forge* or *Allen* v. *Wright*, No. 81-757 (July 3, 1984). Instead, after accepting the Community's allegations in its complaint as true for the purposes of determining its standing, the court of appeals simply disagreed with the district court's conclusion that there is an insufficient causal link between the contracts and the injury that the Community sought to redress in this action (Pet. App. A3). That factbound decision does not warrant further review. The court of appeals' unpublished decision does not conflict with the decision of any other court, and it is not even a precedent within the Ninth Circuit (see Pet. App. A1 n.*). The court of appeals' decision is also interlocutory. The court's ruling places petitioners in precisely the same position that they would have occupied if the district court had denied their motion to dismiss the Community's

fifth claim. If petitioners prevail on remand, their present contention will become moot. If, on the other hand, the Community prevails on remand on their claims against petitioners, petitioners will then be able to present their standing claim to this Court, along with any other claims that they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Alternatively, on remand the Community may be able to rectify any insufficiency in its complaint, as Judge Wallace suggested (Pet. App. A7), simply by amending its complaint to add petitioners to its first and second claims for relief. Indeed, it appears that the Community could do so even if the Court were to reverse the court of appeals on the question presented here.

The court of appeals' decision recognizes that the Community's standing to challenge the effluent supply contract (and the other water delivery contracts) is contingent upon the Community's ability to prove the allegations related to the underlying dispute with the United States. As the court of appeals explained (Pet. App. A4), if in fact the Community is not entitled to membership in the Salt River Project, for example, or in fact the effluent is not project water subject to the control of the Secretary, then the Community clearly lacks standing to assert its claim against the petitioners, and those claims would be subject to dismissal. While we are confident that the Community will be unable to substantiate the allegations which the court of appeals has found to provide standing, those questions are not before the Court at this time. Accordingly, further review of the court of appeals' decision is not warranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
*Solicitor General*

FEBRUARY 1985

**APPENDIX**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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No. CIV 82-745-PHX CLH

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SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,
PLAINTIFF

*vs.*

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

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[Filed Jan. 29, 1985]

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MEMORANDUM OPINION AND ORDER

In its opinion reversing and remanding the judgment dismissing Counts III, IV and V of the amended complaint, the Court of Appeals suggested that consideration be given to "the affect of *Arizona* v. *San Carlos Apache Tribe*, 103 S.Ct. 3201 (1983)." That case was a sequel to *Colorado River Conservation District* v. *United States*, 424 U.S. 800 (1976), which held that (1) the McCarran Amendment, 43 U.S.C. § 666, which waived the sovereign immunity of the United States as to comprehensive state water rights adjudications, provides state courts with jurisdiction to adjudicate Indian water rights held in trust by the

United States, and (2) a water rights suit brougnt by the United States in Federal Court was properly dismissed in favor of a concurrent comprehensive adjudication reaching the same issues in state court. In *San Carlos* the Supreme Court held that if a state court has jurisdiction to adjudicate Indian water rights, concurrent federal suits brought by Indian Tribes, rather than by the United States, and raising only Indian claims, could properly be deferred to the state court suits.

The Indian Community has moved "for an order declaring that [the Court] will proceed to hear plaintiff's Administrative Procedure Act Claim to review the Secretary's decision to exclude the plaintiff's lands from the Salt River Project."

The Salt River Project has filed a motion to dismiss or stay consideration of the Indian Community's claims. The Roosevelt Water Conservation District has filed a motion to defer adjudication of all claims. The Roosevelt Irrigation District has joined in the motions of the Salt River Project and the Roosevelt Water Conservation District. The United States has filed a motion for partial dismissal, which in reality is a motion to strike allegations in the amended complaint relating to the Indian Community's entitlement to water.

The Indian Community alleges that the lands of its reservation have water rights that derive from (1) the Winters Doctrine, (2) the Kent Decree, and (3) the Act of May 18, 1916, 39 Stat. 123.

The Winters Doctrine derives from the Supreme Court's ruling in *Winters* v. *United States*, 207 U.S. 564 (1908), that Indian Tribes located on reservations established by treaties enjoy "reserved" water rights, which vested at the time of the creation of the

reservations. In subsequent decisions the Court has made it clear that the Winters Doctrine applies also to Indian Reservations created by executive order. See, for example, *Arizona* v. *California*, 373 U.S. 546 (1963). Thus, the Indian Community's entitlement to water rights has been established, but the quantification of those rights has not.

An action presently pending in the Superior Court of Arizona in Maricopa County seeks adjudication of all water rights on the Gila River including its Salt and Verde River tributaries. Under *San Carlos, supra*, the quantification of Winters Doctrine water rights would be appropriate in that action. However, there is some question whether the state court has jurisdiction. That question is presently pending before the Arizona Supreme Court. Until that jurisdictional issue is resolved, any proceedings in this case relating to Winters Doctrine entitlements should be held in abeyance.

The Kent Decree was handed down on March 1, 1910, by the District Court of the Third Judicial District of the Territory of Arizona, in the case of *Hurley* v. *Abbott*. It was an extensive adjudication of water rights in the Salt River Valley, and it allocated 12,670 acre feet of water per year to some of the lands of the Indian Community and 6,055 acre feet per year to other lands of the Indian Community. The Court retained continuing jurisdiction of the case. When Arizona became a state, jurisdiction of the case was vested in the Superior Court. The Indian Community should look to the Superior Court to enforce any rights that were established by the Kent Decree.

The Act of May 18, 1916, provides in part:

> "That the Secretary of the Interior is hereby authorized and directed to provide for water rights in perpetuity for the irrigation of six hundred and thirty-one Salt River Indian allotments of ten acres each, to be designated by the Commissioner of Indian Affairs, [from] water from works constructed under the provision of the Reclamation Act, and Acts amendatory thereof or supplement thereto. . . ."

The amended complaint alleges that the Secretary of Interior has never complied with the mandate of the Act and that until 1939 he refused to deliver water to lands of the Indian Community pursuant to the rights he was directed to provide by the Act. During oral argument, counsel for the Indian Community stated that the Commissioner of Indian Affairs had not ever designated the 631 10-acre plots that were to be granted the water rights. The amended complaint also alleges that since 1939 the Secretary has delivered only approximately 20,000 acre feet of water per year and that the 631 10-acre allotments should be entitled to 37,860 acre feet per year. (The Kent Decree includes a finding that 48 miner's inches of water is reasonably necessary for a year's irrigation of 160 acres of land. That converts to slightly more than six acre feet of water per year for each acre of land.) Determining the 631 10-acre plots that are entitled to water rights in perpetuity and determining the amount of water for which there is a right are matters of federal agency action and should not be determined by the state courts.

The Court disagrees with the contention of some of the defendants that any determination of the amount of water to which lands of the Indian Community are entitled pursuant to the Act of May 18, 1916, requires

the joinder of other parties. In 1935 the United States and the Salt River Valley Water Users' Association entered into an agreement whereby the government would pay 20% and the Association 80% of the cost of constructing a dam on the Verde River with the capacity to impound about 200,000 acre feet of water. Among the recitals of the Agreement were (1) a recognition of the provisions of the Act of May 18, 1916, (2) a statement that "arrangements have not heretofore been perfected for carrying out the provisions of the Act," and (3) that "the most feasible means . . . to provide surface water for the Indians of the Salt River Reservation for the irrigation of an additional area of 6,310 acres . . . is by participating in the construction" of the dam. The Agreement provided that the Salt River Indian Reservation was to be alloted one-fifth of all "developed" water, which was defined as all water in the reservoir above the bottom 5%, which was to be reserved to the Association "for regulation of the flow of Verde River which the Association could otherwise divert." In other words, the bottom 5% was the amount of water necessary to provide the "normal flow" of water in the Verde and Salt Rivers that was allocated by the Kent Decree.

Bartlett Dam was constructed pursuant to the 1935 Agreement. Since the completion of the dam in 1939, the only direct users of developed water have been the Salt River Project and the Indian Community. Consequently, the relative rights of the Project and the Community to use the developed water is not a matter of general stream concern nor of state court concern.

This case is more than a water rights adjudication action. The first claim for relief of the amended complaint charges the Secretary of Interior with in-

vidious discrimination against members of the Indian Community by excluding their lands from the Salt River Project's water service area and by denying them the right to vote in the Project's managing council elections and by denying members of the Community ample waters to irrigate their lands when hundreds of thousands of acre feet of Project water are being delivered to users outside the boundaries of the Project.

The second claim for relief accuses the Salt River Project of invidious racial discrimination by failing to deliver water to reservation lands on exactly the same basis as all other lands in the Salt River Project, by excluding Indian lands within the Salt River Project from sharing in the water delivery benefits that are accorded to all other lands in the Project and by denying members of the Indian Community the right to vote in the Project's public elections and the right to hold seats on the Project's management councils.

The third and fourth claims for relief in the amended complaint challenge the legality of contracts of the Salt River Water Users' Association with the Roosevelt Water Conservation District and the Roosevelt Irrigation District for the delivery of water outside the boundaries of the Salt River Project.

The fifth claim for relief challenges the legality of a contract of the defendant cities with the owners of the Palo Verde Nuclear Generating Station for the sale of sewage effluent.

Arizona Public Service Co. has petitioned the Supreme Court for a writ of certiorari to obtain review of the Court of Appeals ruling in this case. All proceedings relating to the third, fourth and fifth claims for relief should be stayed until the Supreme Court has finally ruled.

IT IS ORDERED as follows:

1. The Indian Community's motion "for an order declaring that [the Court] will proceed to hear the plaintiff's administrative procedure act claim to review the Secretary's decision to exclude the plaintiffs' lands from the Salt River Project" is granted.

2. The motion of the Salt River Project and the Roosevelt Irrigation District to dismiss or stay consideration of plaintiff's claims is denied.

3. The motion of the Roosevelt Water Conservation District and the Roosevelt Irrigation District to defer adjudication of all claims is denied.

4. The motion of the United States for partial dismissal is denied.

5. All proceedings in this action relating to a determination of Winters Doctrine reserved rights are stayed pending a ruling by the Arizona Supreme Court on the issue of whether the Superior Court has jurisdiction of a concurrent action.

6. Paragraph 1B of the prayer of the first claim for relief is stricken because the relief requested in that paragraph should be considered by the Superior Court in *Hurley v. Abbott.*

7. All proceedings relating to the third, fourth and fifth claims for relief are stayed until the Supreme Court has finally ruled.

DATED this 25th day of January, 1985.

/s/ Charles L. Hardy
CHARLES L. HARDY
Judge of the United States
District Court

cc: all counsel of record

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